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No. 04-480

IN THE

Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS INC., *ET AL.*,
Petitioners,

v.

GROKSTER, LTD., *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX
Volume III

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ID: 280697

#1

Mike Weiss. CEO StreamCast Networks. I am hear to talk about our very disruptive technology

#2

StreamCast Networks has created a highly scalable distributed peer-to-peer private network which we call MusicCity. I can unequivocally boast that as of today MusicCity is the fastest growing and one of the world's largest peering networks. Not only does it facilitate the downloading of media and content files, it allows people to search, share, communicate and interact with one another on a mass scale. And while we believe that there are other vertical markets on our technology horizon, we are staying squarely focused on this space for the immediate future because of the enormous growth opportunity.

#3 (Strategy)

With all the upheaval in the on-line music space, you may ask why we decided to launch a network with the name of MusicCity, which by its very nature thrust us into the eye of the storm. Unlike Napster, we have always envisioned something much more powerful than the mere sharing of music files. We used the universal language of music as the starting point and the anchor for building our network. Then we set out to make out network into a community. It is communities that creates cities; therefore our name MusicCity is aptly derived. It is the stickiness of our community that will grow our network. We realize that the core value of a peer-to-peer network was the network itself and not necessarily the technology. We charted a course to become the network with the most nodes because in the peer-to-peer world, those with the most nodes will win.

#4 (Phase 1)

We did not set out to be a peer-to-peer technology company. What impressed us at first with Napster was their ability to bring together so many people with shared interests. Than we discovered the existence of a growing and ever present OpenNap community. That community was comprised of early adopters and Napster refugees who were searching for the next "IT". So at the beginning of this year that's where we put our stake in the ground and begin building our network and community. You might call it our "Alpha Network." We achieved our immediate goal of building out brand. Within 90 days we grew to a user base of 6.5 million people. However, we hit a technology ceiling at 42,000 simultaneous users using the open source opennap technology platform. Based upon the same centralized server architecture as Napster, the technology proved not to be scalable. And while we were seeing substantial cost savings by distributing the bandwidth and content through the users, as P2P does, the centralized server approach would still cost us millions of dollars to reach our goal of 1 million simultaneous users. As Tim pointed out earlier – there just aren't millions of dollars available today. That forced us to search for a better solution.

#5 (Phase 2)

That solution is Morpheus. Morpheus is our proprietary peer-to-peer technology platform. Less like Napster, similar to Gneutella, but we solved the scalability issues that has put Gneutella at its ceiling. We adde3d the features that users wanted, such as instant messaging capabilities, automatic resumes of broken content streams and the simultaneous downloading of content files, so that even the largest media files download in a fraction of the time. Morpheus is a full fledged P2P operating system and server driven user interface capable of handling an order of magnitude greater community than any other technology on the market. Within just one month Morpheus has been downloaded nearly 1

million times and we have been on CNET's Top Ten list of all software downloads since our debut. Our network is exploding in popularity daily and we have passed the 120,000 simultaneous user milestone which we can scale to 8X that number. Given our current our rate of growth and technology capabilities, we expect to see that number double month by month. Right now, our traffic is double that of the entire Internet radio industry and approaching the same number of user hours that AOL realizes.

#6 (Phase 3)

OK...last year having traffic numbers like that would have given our company a valuation into the billions...remember when broadcast.com sold to Yahoo for $5.5 billion? But the name of the game today is revenues. And we are building ours by defying all convention wisdom.

A big bulk of our revenue comes from advertising – at a time that advertising is a four letter word to many in the investment community – to us those four letters are CASH.

And we can do so where others have failed – even in this highly depressed ad environment – because we are leveraging our proprietary Peer-to-peer technology to achieve an unprecedented low cost of goods. Coupled with a very tight rein on our burn rate—currently less than $150,000 monthly—we now have a clear path to break-ven and profitability projected within the next 60 days.

420083: Brian Chatterton {F}

ItemID: 420083

From: Stephen Smith
To: 'Jason Geraci'
CC:
BCC:
Subject: Brian Chatterton {F}
Date: 11/20/2001 7:24:00 AM

Attachments

Jason -

Thank you for the email.

At the present time I am not exploring any further online marketing opportunities. It is best that you follow-up with our media agency, DRK Advertising, on this.

The contact is Lacey Southerland and she can be reached at 617-542-5848.

Regards,

Stephen Smith
Director, Marketing Communications

----Original Message----
From: Jason Geraci [mailto:jasong@streamcast.ws]
Sent: Tuesday, November 20, 2001 3:14 PM
To: 'ssmith@ati.com'
Subject: Brian Chatterton

Steve,

Hello, I talked to Brian Chatterton and he told me that this would be the best way to get in touch with you. I know how it is to have your voicemail box filled to the brim. The reason I write is because Brian said your fiscal budget runs from Aug 31 to Aug 31 and so that means you are probably getting a lot of your marketing strategy off the ground, especially for the holidays. I work for Streamcast Networks (aka Morpheus) which is similar to what Napster was, so we have roughly the same market as you do. I am wondering if we can talk over the phone sometime and see if we can help each other out...my number is 615-261-0235 ext. 105. Thanks so much for your time, I will be looking forward to your call.

Jason C. Geraci

428797: Musictoad Communications Proposal - 9-10-01{F}

ItemID: 428797

From: Charles Highsmith
To: ElizabethCowley
CC: into
BCC:
Subject: Musictoad Communications Proposal - 9-10-01{F}
Date: 10/15/2001 5:15:00 AM

Attachments

Hi Elizabeth,

Thanks for the fast response. We are currently drafting a second proposal which should explain all the questions you have and more. It will go into detail about specified technical aspects and discuss both client and server side technologies as they are related to the Morpheus applications and our own internal client technologies. Even though Morpheus at the moment is in a league of it's own it does have similarities that are inclusive with other p2p applications and one of them happens to be the centralized server format. Morpheus utilizes a server side network which is used to "bus" client connections to the appropriate defined search criteria. So arguably it could be seen as a tool that encourages if not simply acts as an aid for users to share copyrighted materials although that might not be the true essence of what the company is trying to accomplish. There are current instances that you can see in our current politics that attributes to the example of an entity being held responsible because of it's "users" actions and the fact that this particular entity refuses to rectify the situation by turning over certain extremist to the united states. Although that notion is far from the dealings of the music industry it is a

very perceivable argument for the RIAA. Our main goal is to eliminate any type of litigation MusicCity might face from any organization claiming MusicCity is in violation of any functional wrong doing. Given a current analysis of Napster latest court hearing it is obvious that the record industry is most certainly going for the zero tolerance of any type of assumable instruments that allows for trading of unauthorized or "noticeable" materials. And though this court hearing might be the next step for MusicCity in its fight to maintain a completely unaltered file sharing system it will most likely not be its last. If you and you associates would take into the consideration of incorporating our methods of completely eliminating any type of outside interferences to the on-going fight for file sharing freedoms. I ask that MusicCity partner with Musictoad not only to provide a method that allows for legal file sharing but also to pave the way for the future of the Music Industry as we know it and to create an unstoppable force in Digital and Global internet distribution.

-Charles Highsmith

or more information, or to offer a meeting schedule, please contact me or write to info@musictoad.com.
Musictoad Communications{http://www.musictoad.com/)
6320 Canoga Ave., Suite 1500
Woodland Hills, CA 91367

(818) 227-5118 Office
(818) 425-5661 CEO and Musictoad Mallrat Charles Highsmith
(949) 378-2186 Executive Business Director, Andrew Cheng
(305) 25507153 Executive Director of Development and Chief Technologist

**********REPLY SEPARATOR**********

On 10/1[illegible] 6:12 PM ElizabethCowley@aol.com wrote:

First questions: Where do you propose this central list exist? Who pays for it? You say this is an alternative to charging for P2P - but where does the revenue come from?

Our current position: We do not have central servers and can not control our content - and don't want to. It is this architecture that we believe protects us from successful litigation. As I mentioned, the RIAA has filed a suit against us (although we have yet to be served) and we expect to win as what they are asking the court to rule on has less to do with copyright infringement and more to do with the architecture of the entire Internet. Microsoft, Sun, etc., are not going to sit by and let the RIAA dictate how they do business.

However - there is a potential for us to licensee our technology or private label it. In this way we might be able to utilize our network and your technology But who's going to pay and how would that make money?

436042: Internal links for Morpheus {F}

ItemID: 436042

From: Darrell Smith
To: Mat Merriett
CC:
BCC:
Subject: Internal links for Morpheus {F}
Date: 7/27/2001 5:44:00 AM

Attachments

Search for media
http://localhost/KazaaSearch

Experience your media
http://localhost/KazaaMyKazaa

Find media to share
http://localhost/KazaaImport

Example:

Search everything for "sting"
http://localhost/KazaaSearchQuery?query=sting&Submit=Search+Now&type=everything

Search Music for "sting"
http://localhost/KazaaSearchQuery?query=sting&Submit=Search+Now&type=music

436988: Screen Shots

ItemID: 436988

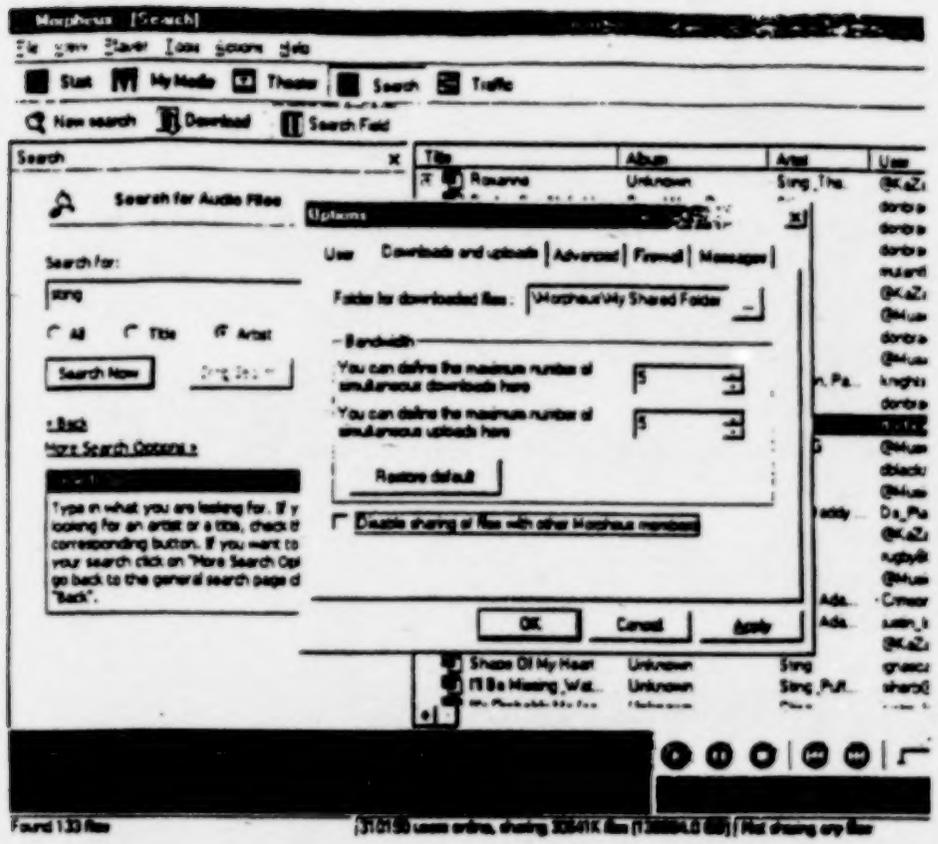
From: Paul Panetti
To: Margaux Ayn Schaffer
CC:
BCC:
Subject: Screen Shots
Date: 7/6/2001 12:25:00 PM

Attachments
max uploads.jpg
song length.jpg
user menu.jpg
user right-click.jpg

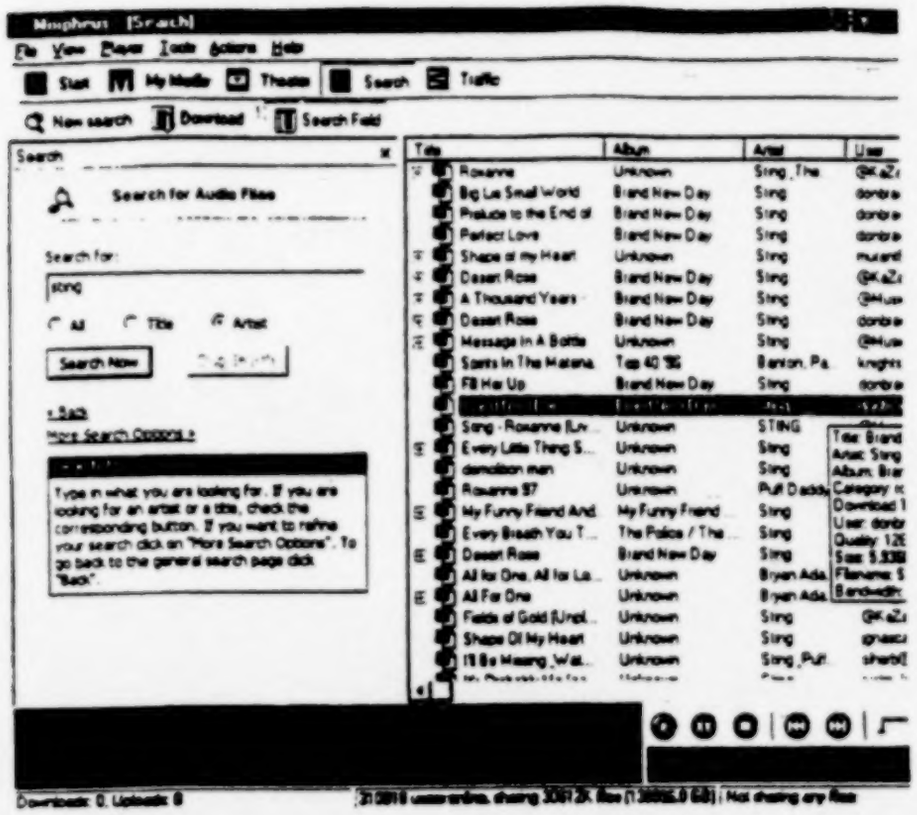
Hi,

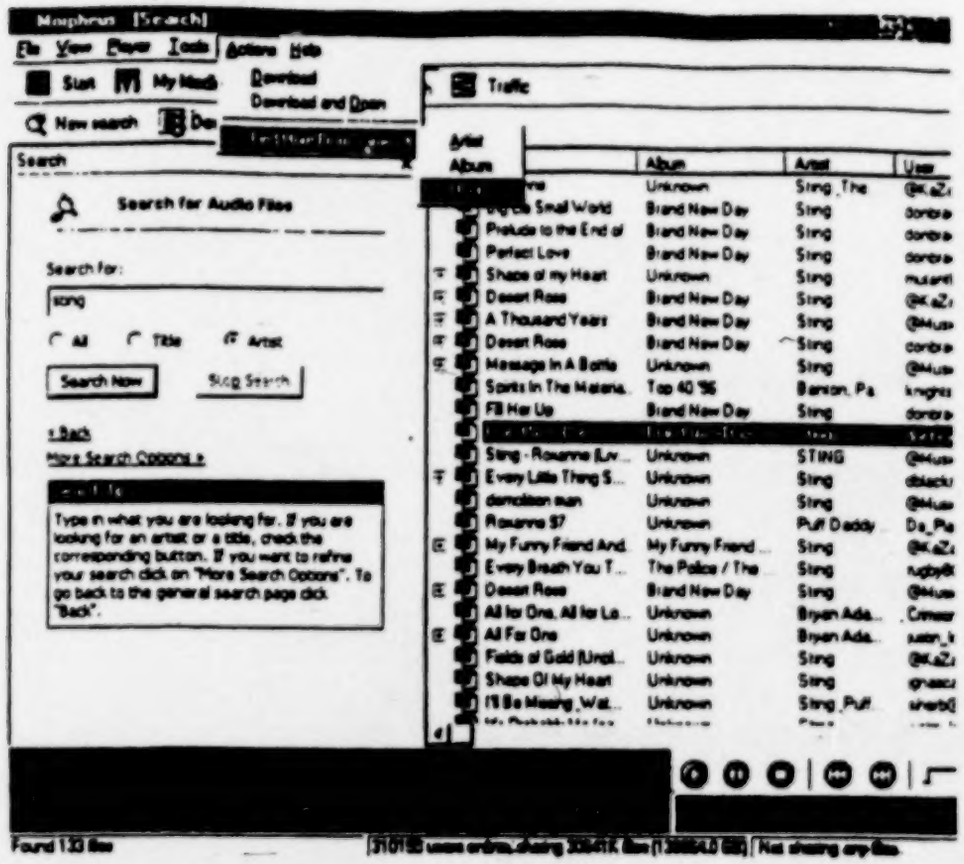
These are the screen shots Darrell want me to send to you.

Paul...



BEST AVAILABLE COPY


Search for Audio Files
Search for:
sting
All
Title
Artist
Search Now
Stop Search
« Back
More Search Options »
Type in what you are looking for. If you are looking for an artist or a title, check the corresponding button. If you want to refine your search click on "More Search Options". To go back to the general search page click "Back".
Title
Album
Artist
Rosanne
Unknown
Sting, The
Big Lie Small World
Brand New Day
Sting
Prelude to the End of
Perfect Love
Shape of my Heart
Unknown
Desert Rose
A Thousand Years
Message in A Bottle
Sports In The Matena...
Top 40 '96
Benton, Pa
FB Her Up
Sting - Rosanne [Liv...
STING
Every Little Thing S...
dancition man
Rosanne 97
Puff Daddy
My Funny Friend And...
My Funny Friend
Every Breath You T...
The Police / The...
All for One, All for La...
Bryan Ada...
All For One
Fields of Gold [Unpl...
Shape Of My Heart
I'll Be Missing Wat...
Sting, Puff


Search for Audio Files
Search for:
sting
All
Title
Artist
Search Now
Stop Search
« Back
More Search Options »
Type in what you are looking for. If you are looking for an artist or a title, check the corresponding button. If you want to refine your search click on "More Search Options". To go back to the general search page click "Back".
Album
Artist
Unknown
Sting, The
Big Lie Small World
Brand New Day
Sting
Prelude to the End of
Perfect Love
Shape of my Heart
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Desert Rose
A Thousand Years
Message in A Bottle
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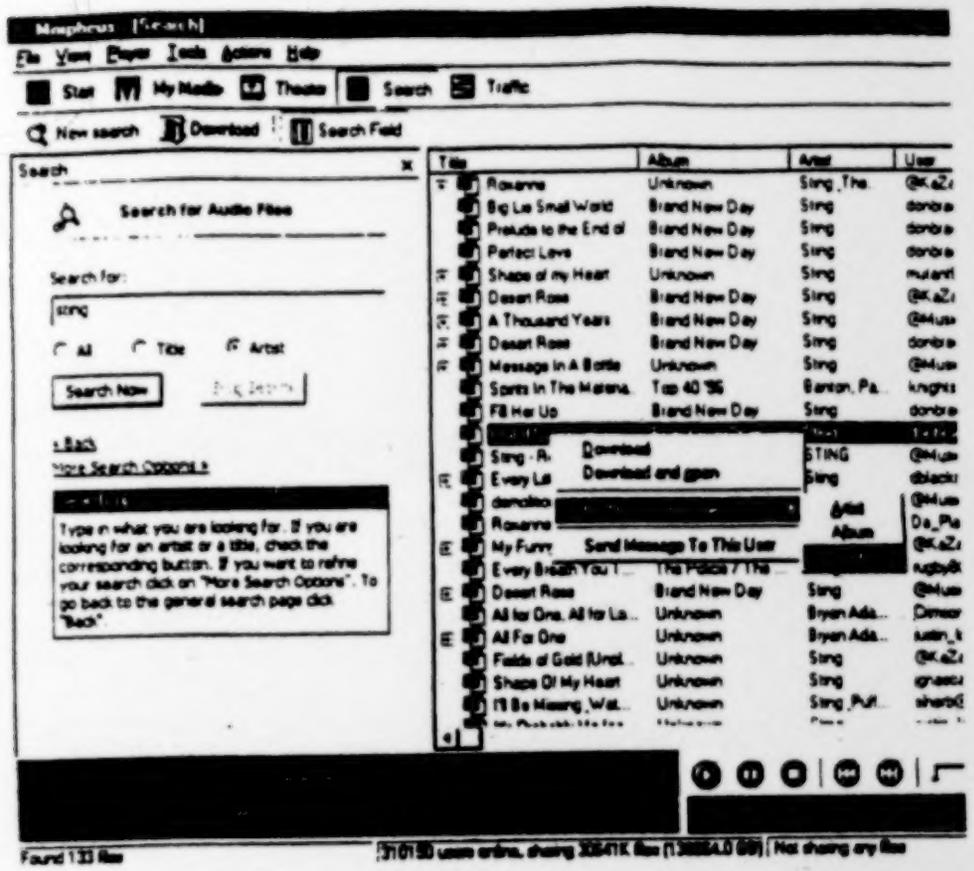
Top 40 '96
Benton, Pa
FB Her Up
Sting - Rosanne [Liv...
STING
Every Little Thing S...
dancition man
Rosanne 97
Puff Daddy
My Funny Friend And...
My Funny Friend
Every Breath You T...
The Police / The...
All for One, All for La...
Bryan Ada...
All For One
Fields of Gold [Unpl...
Shape Of My Heart
I'll Be Missing Wat...
Sting, Puff



438121: screen of bug during search{F}

ItemID: 438121

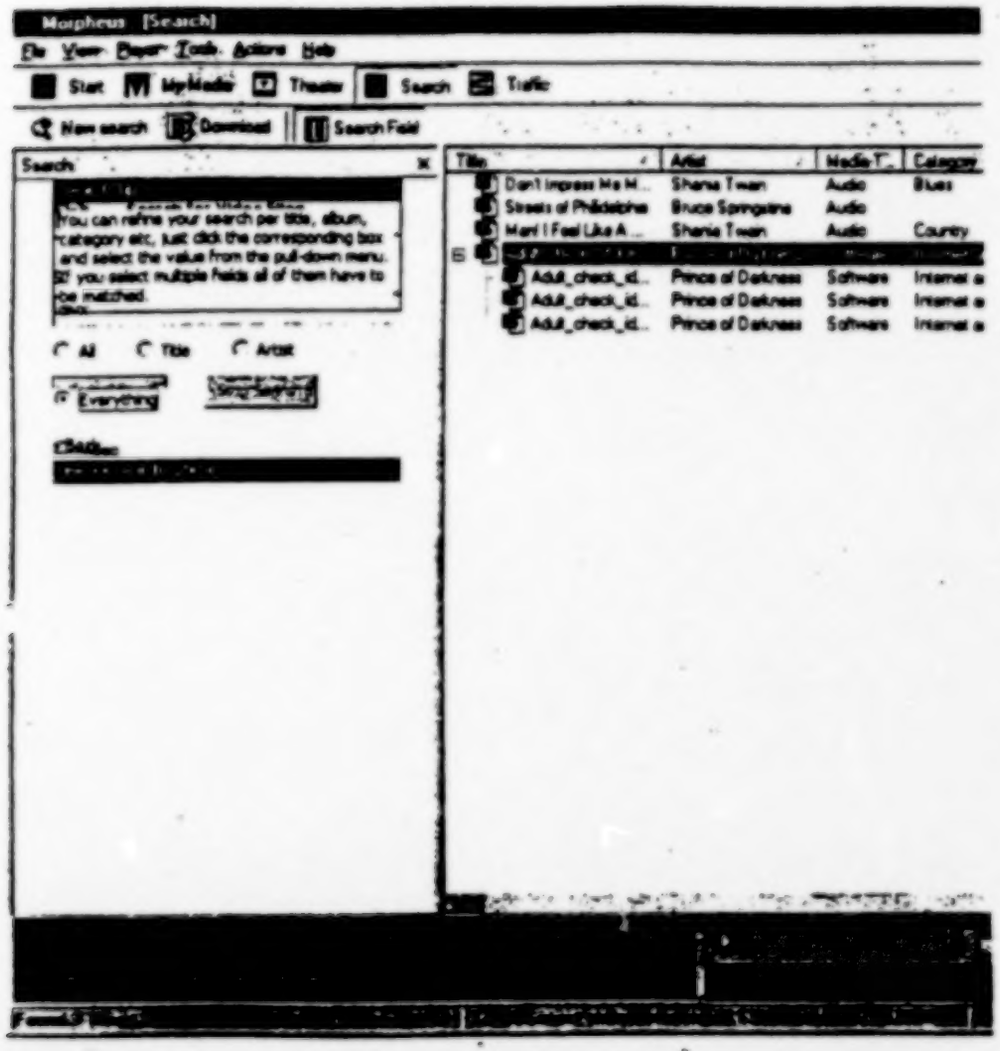
From: Darrell Smith
To: Michael Weiss
CC: Paul
BCC:
Subject: screen of bug during search{F}
Date: 7/5/2001 10:33:00 AM

Attachments
morpheus13Bug.jpg

----Original Message----
From: Darrell Smith [mailto: darrell@indirect.com]
Sent: Thursday, July 05, 2001 5:32 PM
To: Niklas Zennstrom
Subject: screen of bug during search

Items to look at:
1. no realm name
2. during the search of a users computer the left column start displaying information incorrectly. Once this problem occurs it doesn't go away.

Darrell



543771: MusicCity website copy{F}

ItemID: 543771

From: Darrell Smith
To: woodyphillips@mindspring.com
CC:
BCC:
Subject: MusicCity website copy F}
Sent Date: 2001-Jan-09 18:43:43
Received Date: 2001-Jan-09 18:42:00

Attachments
MusicCity OpenNap Web Site Copy 1.doc

----Original Message----
From: Michael Weiss [mailto: mike@streamcast.ws]
Sent: Thursday, January 04, 2001 7:36 PM
To: Darrell Smith
Subject: MusicCity website copy

Let me know if this need any modification. It got a little more involved than I first imagined.

MusicCity.com…your smart connection to audio on the Internet. The fastest, most reliable alternative service to Napster…and it's FREE.

Be Prepared If Napster Inc. Lets You Down

Napster Inc. has announced that it will soon begin charging you a fee. That's if the courts don't order it shut down first. What will you do to get around it? The independent servers, those that are not affiliated with Napster Inc. will remain open and free regardless of any corporate decision by Napster Inc. to charge a monthly fee or any court decision that cause Napster Inc. to be shut down.

Don't Be Tricked

Be aware before installing Napster Inc.'s new **beta 8** software. If you do, you can only connect to Napster's corporate servers, not the other free independents. If you already did, uninstall it and download a previous version or the OpenNap software. Either of these will allow you access to the independent alternative and OpenNap servers as well as Napster Inc.'s own servers.

(Download Link?)

If you are a current Napster client user (and not using their beta 8 software) you can log onto the Napigator website to access the list of independent OpenNap servers to use as a free alternative to Napster. There are over 360 independent alternative Napster and OpenNap servers operated worldwide…more than triple the number of Napster Inc. corporate servers. MusicCity.com operates the largest number of these non-Napster, Inc. servers and you can click here to access them.

Why MusicCity.com OpenNap Alternative Network is the Best Napster Alternative.

- MusicCity.com is the only alternative Napster network that owns and controls all of the servers on its network.
- MusicCity.com provides faster search results than all other alternative Napster networks.
- MusicCity.com network provides far superior performance quality than all other alternative Napster Networks.
- Just like Napster Inc., MusicCity.com provides cross-searching functionality between all its servers—giving you a combination of the fastest download times and greatest number of files for sharing.
- Similar to Napster Inc., MusicCity.com uses an ultra-fast high speed professional Internet backbone network providing users with dependable connections and a minimal drop-offs to avoid interruptions in your downloads.
- Click here to log onto the MusicCity.com OpenNap Alternative Network now.

Share MusicCity With A Friend

We have the most reliable servers and fasted internet connections for peer-to-peer file sharing. You can help increase the number of files for sharing by sending the MusicCity.com OpenNap link to your entire contact list. Just click here to send.

Note: MusicCity.com does not endorse the practice of sending unsolicited e-mails, also known as "spam." Please send these e-mails only to people you know who would be interested in accessing audio files using MusicCity.com's

OpenNap servers. If someone asks you not to send these e-mails to them, please comply.

FREE MusicCity.com Services Coming Soon

- Download the MusicCity.com ***all-in-one*** interface that will allow you instant access to all file sharing networks simultaneously and allow you to communicate with all instant messaging services.
- Let MusicCity.com be your gateway to access all music and audio downloads available on the net.
- Tune into all streaming audio sites and web radio stations from around the world.
- Chat with the Alternative Napster community.
- Link to your favorite recording artists' websites.
- Listen and read all the latest news, information and tips regarding music, MP3 and file sharing on the web.

Register Now To Be Notified Of Upcoming MusicCity.com FREE Services - Note: We respect the privacy of our users. MusicCity.com has adopted a privacy policy to safeguard your private information. All registrations and email addresses will be kept strictly confidential and will not be shared or sold to any corporation or individuals whatsoever!

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FREQUENTLY ASKED QUESTIONS

Q: Will I be banned from **Napster** for using **MusicCity's** OpenNap Alternative Network?
A: No, Napster Inc. has not banned anyone for using MusicCity.

Q: My university has blocked access to **Napster Network**, can I still use **MusicCity**?
A: Yes! Your university or ISP may still allow access to **MusicCity**.com **OpenNap Alternative Network**.

Q: I can't seem to connect to **Napster Network** anymore, have I been banned?
A: Unless it specifically says, "You have been banned and are being disconnected" you are **not** banned.

Q: How can I find out when the **MusicCity.com all-in-one interface** will be available for download?
A: Register for notification by clicking here.

Q: How can **MusicCity.com** increase the number of files available through its network for sharing?
A: Since MusicCity.com does not host files on its servers, you can increase the number of files available by having your friends log onto the **MusicCity.com OpenNap Alternative Network** with you. **Send MusicCity.com to a friend** so they can list their files, too.

Q: Napigator doesn't seem to work under NT4 or Windows 2000, why not?
A: You need to run Napigator under the administrator account, or with admin privileges.

MusicCity.com Policy

MusicCity.com OpenNap Alternative Network allows users to share their MP3 files with one another. The MP3 files located through our network are not stored on our servers. MusicCity.com does not and cannot control what content is available to users through the network. Users decide what content to make available to others and what content to download. Users are responsible for complying with all applicable federal and state laws applicable to such content, including copyright laws. Unauthorized copying, distribution, modification, public display, or public performance of copyrighted works is an infringement of the copyright holders' rights. You agree that you will not use the MusicCity.com OpenNap Alternative Network to infringe the intellectual property rights of others. In accordance with the Digital Millemium Copyright Act of 1998 (the text of which may be found on the U.S. Copyright Office web site at http://leweb.loc.gov/copyright/), MusicCity.com will respond to claims of copyright infringement committed on our Network that are reported to MusicCity.com. If you are a copyright owner, or authorized to act on behalf of an owner of the copyright or of any exclusive right under the copyright, please report your notice of infringement to MusicCity.com.

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543791: Strategy Paper{F}

ItemID: 543791

From: Darrell Smith
To: Michael Weiss
CC:
BCC:
Subject: Strategy Paper {F}
Sent Date: 2001-Jan-10 14:54:36
Received Date: 2001-Jan-10 14:54:00

Attachments
MusicNap Strategy REV 2.doc

Update on strategy paper.

Darrell

----Original Message----
From: Michael Weiss [mailto: mike@streamcast.ws]
Sent: Wednesday, January 10, 2001 2:57 PM
To: Darrell Smith; Steve Griffin
Subject: Strategy Paper

Please review ASAP so we can discuss in 10 minutes. I'll phone. Looks like OpenNap has a resurgence.

Vertical Market Deployment Of
StreamCast Networks Technology

Background:

October, 2000

- The board agreed with management's request shifting its MusicCity.com B2C strategy to a B2B StreamCast Networks strategy focusing efforts on the development of

an XML-based streaming user interface called "Morpheus."
  - A partnership was struck with Chromium Communications to use their technology to enable the interface to stay persistent on-screen (as opposed to using the more costly and technically limiting xSides technology).

November, 2000

- Management conceived a guerilla marketing plan to utilize prior MusicCity computer hardware to create a "MusicCity.com Alternative Napster Network" with the goal to secure users for its Morpheus interface once developed and to be positioned to take advantage of defection of Napster users once Napster begins a subscription service.
- Morpheus prototype development continued with internal break-through negating need to license Chromium technology, providing significant cost-savings, increased capabilities and 100% control over our technology.
- Changed corporate identity to StreamCast Networks & launched new websites.
- Linked partnership agreement with Groove Networks.
- Reduced monthly burn-rate to approx $50,000.

December, 2000

- Reconfigured 10 dormant MusicCity servers with Linux OS, installed OpenNap software, linked servers together and began stress testing at Sherman Oaks data center facility.
- Morpheus prototype development completed and presented to Macromedia, who suggested development of a server-side software product, which we began architecting.

January, 2001

- Went online with "MusicCity.com Alternative Napster Network" on 1/3/01 and secured listing on Napigator site.

- Within one week had the following results:
  - Grew from 315 simultaneous users sharing 55,000 MP3 files within the network on 1/3/01, to a staggering 33,000+ simultaneous users sharing over 5 million MP3 files on 1/10/01 which approximates to 150,000+ unique users on that day. Average time spent per user on network exceeds 3 hours.
  - We are the only Alternative Napster Network that owns and controls all of the servers on its network.
  - We are able to provide faster search results than all other alternative Napster networks…and second only to Napster Inc., itself.
  - Just like Napster Inc., we provide cross-searching functionality between all our servers—giving the user a combination of the fastest download times and greatest number of files for sharing. The other alternative Napster networks do not offer this function.
  - Within one week we have become the 3rd largest Alternative Napster Network worldwide and have the opportunity to become #1 within a short period of time.
  - Developed & launched "renegade" MusicCity.com website to secure eMail addresses.
  - Accomplished above without the benefit of marketing or promoting the network, utilizing existing MusicCity equipment & without increasing our monthly budget.

Opportunity:

- Capitalize on the hyper-growth of users accessing our "MusicCity.com Alternative Napster Network" by developing a MusicCity.com branded Morpheus interface for downloading.

  - Basic of growth due to providing an incremental value to Napster users by providing faster and better user experience.
- Concentrate our efforts on the vertical P2P music market by utilizing our technology to create a "Napsteresque" personalized radio business model, not too dissimilar from the original MusicCity.com business strategy with revenues paid by advertisers and sponsors.
- Deploy StreamCast technology to a vertical market through MusicCity.com to capture potentially millions of users generating significant revenues and profitability within the first year and pave the way for StreamCast Networks to enter into other verticals with a market-proven and accepted technology.
- Firmly entrench ourselves in the hot P2P computing space and become the "*Poster-Child*" for the free alternative Napster movement…perhaps create a coalition of Alternative Napster Networks & Users.
- Create the second largest P2P Network, after Napster.
- Position ourselves to capitalize on the mass exodus of 30 million Napster users once Napster switches to a paid subscription model - potential to pick up 25% of their users quickly.
  - Current Napigator poll of 4500 users state that "77% will never pay for a Napster subscription at any price."
  - Current Xnapster poll of 5125 users state that "88% would prefer an ad driven Napster model over a $5 monthly subscription pay model."
- We believe we have "stumbled" onto the *holy grail* of a profitable internet radio formula by utilizing the Peer2Peer network to absorb the prohibitive bandwidth costs of streaming media that every other internet radio & music company faces - we call it "pseudo streaming."

Perhaps it might not be a "Real (Networks) Killer", but it is certainly a "Spinner-Killer."

- Compare our current "MusicCity.com Alternative Napster Network" base of 13,500 simultaneous users with WABC-NY, the most popular internet radio station as measured by MeasureCast, that averages only 388 simultaneous users.

- The fundamental change in the online music marketplace over the past 6 months coupled with the development of our new technology and proven metrics of user acquisition has allowed our original MusicCity.com business plan to become viable once again and plays to the core competency of our team and allows us to better utilize the past investments in the company.

Strategy:

- Immediately increase the number of servers deployed on the "MusicCity.com Alternative Napster Network" from 10 to 24 minimally, potentially up to 50.
  - 24 servers would more than double our existing traffic and solidly position us as the #2 Alternative Napster Network within a few days of deployment.
  - The addition of 40 new servers will ensure that we become the dominate Alternative Napster Network in the same time period.
- Implement guerilla and viral marketing programs to increase the number of users on the "MusicCity.com Alternative Napster Network."
- Implement a MusicCity.com branded Morpheus interface feature set appealing to the Napster Peer2Peer target user giving them value added features not available elsewhere.
- File multiple patents on Morpheus user interface, Morpheus server-side software and MusicCity.com P2P radio model.
- Capture eMail addresses of "MusicCity.com Alternative Napster Network" users via the MusicCity.com website

to provide a ready customer base to download the MusicCity branded Morpheus interface.

- Provide the other leading Alternative Napster Networks with their own branded Morpheus interface on a revenue sharing basis to promulgate the P2P music space with our technology.
  - Search for other partnering or acquisition opportunities within the OpenNap community.
- Develop a strategy for a negotiated settlement with the music industry that is based on an advertising model as opposed to a subscriber-based model. Prepare for potential lawsuits.
- Develop a "Spin-Off & Sell" exit strategy of the MusicCity vertical.

Morpheus Interface Functions For MusicCity Client:

1. **P2P Access:** Simultaneously use all the popular peer-to-peer file swapping applications, such as Napster, OpenNap, Gnutella and FreeNet;
2. **IM:** Send and receive instant messages across all the popular messaging applications, such as AOL, Yahoo, ICQ and Microsoft—even if the recipient and sender are using different applications;
3. **QuickSearch:** Simplify searches by typing into the Muze database; and provide enhanced album/song/artist/artwork info (rid hassle of Napsteresque cryptic files);
4. **FQC: File Quality Control** - We find the optimal music file of the song you want to download (listen to); ranking the quality of each song and weeding out bad files automatically;
5. **RPM: "Radio" Playback Mode** - Caches downloads for automatic playback of user generated playlists:
   a. A search, store and process (listen) mode
   b. Multiple search modes: song, artist, album, genre, year

c. Manage the caching of songs to play personalized playlists
    i. Time limit for inactive and non-owned songs to remain cached on hard drive

6. **Security:** features w/watermarking; allows us to allocate the number of times a song is played through Morpheus; allows us to remove songs from hard drives that are not favorites of users;
7. **Organization:** Organize P2P downloads by genre;
8. **Programming:** Tie in similarity engines to assist users fining songs they would like
    a. Can be based upon popularity within user base community
    b. Help users sift through undesirable songs based upon user tastes & preferences
    c. Create multiple programming hooks (see RPM) for variety and ease of use for user
9. **Advertising:** Targeted rich media and audio advertising capabilities by listener demographics
10. **Promotional:** tie in advertising, promotions with specific music file downloads
11. **MyNapster:** Client link
12. **Napigator:** Download link
13. On-line **Chat** links
14. **Share** with a friend function
15. Utilize functionality of Windows Media Player.
    a. to allow users to access on-line radio stations and serve up advertising
    b. to playback MP3 files & CDs
16. Data Retrieval

Market Advantage (perhaps we could do a chart with X's)

- Benefits of a P2P Internet radio business model vs a Streaming Media Internet Radio business model:

- No bandwidth costs
- No Storage costs
- No product costs to acquire music
- Ability to get all the music
- World coverage with no restrictions
- Reduced manpower costs
- Reduced customer acquisition and marketing costs

Technology Advantage *(Darrell - these are notes I had from Bill that he thought was important)*

- Morpheus is a server-driven infrastructure that will allow us to stream applications, rich media ads and in-stream audio ads within the Morpheus client interface as well as push new software updates automatically to users.
- The Morpheus server allows for the sharing of both real-time running applications and data files throughout the Morpheus network.
- The Moropheus infrastructure features the ability to manage P2P connectivity between client and also P2P connectivity between servers. This P2P ability with the client and with the servers allow for a distributed network that pushes scalability from a centralized data center on to the hole network. Moving scalability from a centralized data center to the net work increases product distribution speed to end users and lowers network distribution cost.
- MP3 is the pervasive technology in online music, not Liquid Audio, not Real Networks
- We are more like AOL than Real Networks in that we can automatically upgrade new versions of the Morpheus interface to users as opposed to having users download new versions due to our server-based architecture.
- leading edge peer2peer server based + Server driven Peer2Peer client that allows us to plug in other applications.

- Our client is driven by the server side solution

Timeline (work in progress)

Network Build Out

Jan 29 - Addition of 14 new servers
Feb 15 - Addition of 26 new servers (optional)

Network User Acquisition

January 11-Launch guerilla marketing campaign to attract more users to Network
January 15-Begin formalizing marketing partnerships with other Alternative Napster Networks
January 29-Media reach-out program

Morpheus MusicCity Client Development

Phase 1 - 6 - 10 weeks (based on budget allocation)

1. Protocol compatibility with OpenNap, MyNapster, and Napster (pre version 8).
2. Basic Napster level chat
3. Upgrade notification
4. AD insertion (flash based)
5. Fast Search Engine
6. Hotlist
7. Clear Search (Display a clean results list of files)
8. MyNapster / Napigator
9. Testing & Debugging + 7 - 14 days (based on budget)

Phase II - +6 weeks

1. IM capability with MSN, AOL and Yahoo
2. Audio insertion of Ads (Audio cached)
3. Targeted rich media by listener demographics
4. Smart search result
5. Save directly to Xdrive or local hard dive
6. Security counter
7. User Rating System (thumbs up or down) this can also be automated based on play frequency of users

songs.

Phase III - +4 weeks

1. Similarity search
2. Download single files from multiple sites for faster download.

Revenue Assumptions:

Budget

Revenue Projections and Assumptions for MusicCity.com

Assumptions Audio Ads

- MCITY will insert 3 audio ads per hour to consumers using Music Morpheus.
- The price starts at a cpm of $25 and declines by year five to $15.
- It is assumed that on average the consumer will have Morpheus open on their computer screen an average of only 46 minutes per day.
- These numbers are net of the projected 30% ad selling commissions. It should be noted that based on the millions of dollars spent at this level, the company expects to launch its own sales force by year three.

Rich Media Ads

- MCITY will have 20 minutes of rich media ads to consumers each hour. The price starts at a cpm of $10 and declines by year five to $8.
- It is assumed that on average the consumer will have Morpheus open on their computer screen an average of only 46 minutes per day.
- These numbers are net of the projected 30% ad selling commissions.

Sponsorship Gateway Audio Ads

- This revenue is defined as fees paid advertisers who want an opening audio for each Morpheus session.
- The projected user session is 3 hours per connection.
- MCITY will charge $50 CPM for this audio gateway.
- These numbers are net of the projected 30% ad selling commissions.

Revenue Projections

MISC NOTES - Bill

Quantified by where we have been in the last 7 days - we have a proven target market going through our servers.

We didn't know how to get customers before; instead we are going into the Alternative OpenNap Community; we can get the customers to download the interface because it makes it easier; secondly we haaaave cut the costs.

1. Broadcasting model before; cut mktg costs, prove we can get users (AMAZING; cost of acquisition, CDs)
2. How do we get the dogs to eat the dog foods—how do we get money; what functionality do we bring to the party that allows users

Through P2P, give them access to any music they want, then find music they like, charge them to burn it
Ratings system to get the better quality masters
Tile into Muze database to make it easier
Programming: Help them understand which songs to download

Based upon popularity?
Value added is the programming, so you sift through the bullshit of bad songs.

543811: MusicCity.com{F}

ItemID: 543811

From: Darrell Smith
To: Kevin OConnor
CC:
BCC:
Subject: MusicCity.com{F}
Sent Date: 2001-Jan-11 16:23:52
Received Date: 2001-Jan-11 16:20:00

Attachments

Hey Kevin,

I just launched the 3rd largest Napster network on the internet on January 4th. On day one I was the only person on the serve and in the last 7 day it grew to 30,000 simultaneous user sharing over 6 million files. I'm going to order 40 Dell servers tomorrow. The goal is to get in trouble with the law and get sued. It's the best way to get in the new.

StreamCast is the technology behind the servers with MusicCity and in the spot light to cause trouble.

By the way I'm trying to get Barry for CGL.

Let's get together so you can update me on your new job.

Darrell

544361: Mitchell Silberberg & Knupp, LLP{F}

ItemID: 544361

From: Darrell Smith
To: Danderson@directgage.net
CC:
BCC:
Subject: Mitchell Silberberg & Knupp, LLP{F}
Date: 3/7/2001 10:01:00 PM

Attachments

Just found another one: http://www.netpd.com/, they are the hackers for the RIAA and Metalica.

Darrell

----Original Message----
From: Derek Anderson [mailto: Danderson@directgage.net]
Sent: Wednesday, March 07, 2001 7:54 PM
To: 'Darrell Smith'
Subject: RE: Mitchell Silberberg & Knupp, LLP

Done..their ip block is 207.243.213.

just banned it..I only see one c class..so hopefully there using a proxy from one IP for all their users..but the whole C class is banned..;)

----Original Message----
From: Darrell Smith [mailto: darrell@indirect.com]
Sent: Wednesday, March 07, 2001 1:12 PM
To: Derek Anderson
Subject: Mitchell Silberberg & Knupp, LLP

This is another for the ban list.

Darrell

http://www.msk.com/

545341: mediaenforcer{F}

ItemID: 545341

From: Darrell Smith
To: Michael Weiss
CC:
BCC:
Subject: mediaenforcer{F}
Date: 6/28/2001 8:32:59 PM

Attachments

----Original Message----
From: Niklas Zennstrom [mailto: niklas@fasttrack.nu]
Sent: Thursday, June 28, 2001 6:07 PMPM
To: 'Darrell Smith'
CC: Priit Kasesalu
Subject: mediaenforcer

Darrell,

We are investigating bot and possibilities tro break into the network, or have we can better defend ourselves from that. It would help if you could give us as technically precise description of how MediaEnforecer works (or how you think it works).

Thanks.

Niklas Zennstrom
Fasttrack/KaZaA
T: +46 8 440 09 86
M: +46 733 344 870
ICQ: 5986 8988
www.fasttrack.nu
GMT+1
Get experienced - www.KaZaA.com

545361: MediaEnforecer{F}

ItemID: 545361

From: Darrell Smith
To: Priit Kasesalu
CC:
BCC:
Subject: MediaEnforecer{F}
Date: 6/29/2001 4:02:35 PM

Attachments

That's good, no more MediaEnforcer…let me know when your company has some available time, my current budget is $100,000 US to start.

Good job with MediaEnforcer.

Darrell

----Original Message----
From: Priit Kasesalu [mailto:priit@bluemoon.ee]
Sent: Friday, June 29, 2001 3:44 PM
To: 'Darrell Smith'
Subject: Re": MediaEnforecer

try this serial number: 536438771

Too late, I've already cracked the program :) But thanks anyway. They were using kazaa.com web site to do searches and I've blocked if now

also does your company need any funding for development projects?

If you mean us (Bluemoon) then we are rather busy with the other projects currently, but if you have some interesting projects we could sure do something in the future :)

Priit Kasesalu

priit@bluemoon.ee

----Original Message----
From: "Darrell Smith" darrell@indirect.com
To: "Priit Kasesalu" priit@bluemoon.ee
Sent: Saturday, June 30, 2001 00:03
Subject: RE: MediaEnforecer

----BEGIN PGP SIGNED MESSAGE----
Hash: SHA!

Hi Priit,

try this serial number: 5364387771, also does your company need any funding for development projects?

Thanks,

Darrell

From: Priit Kasesalu [mailto:priit@bluemoon.ee]
Sent: Friday, June 29, 2001 2:41 PM
To: Darrell Smith
Subject: Re: MediaEnforecer

Do you have registration code for MediaEnforecer?

Priit Kasesalu
priit@bluemoon.ee

----Original Message----
From: "Niklas Zennstrom" niklas@fasttrack.nu
To: "Priit Ksaesalu" priit@bluemoon.ee
Sent: Friday, June 29, 2001 23:41
Subject: RE: MediaEnforecer

Ask darell

----Original Message----
From: Priit Kasesalu [mailto:priit@bluemoon.ee]
Sent: Friday, June 29, 2001 22:33
To: Niklas Zennstrom
Subject: Re: MediaEnforecer

It requires registration code.. Did you get it too?

Priit Kasesalu
priit@bluemoon.ee

----Original Message----
From: "Niklas Zennstrom" niklas@fasttrack.nu
To: "Priit Ksaesalu" priit@bluemoon.ee
Cc: "Ahti Heinla" ahti@ahti.bluemoon.ee; "Jaan Tallinn" jaan@bluemoon.ee; "Edwin Metselaar" edwin@fasttrack.nu; "Janus Friis" janus@fasttrack.nu
Sent: Friday, June 29, 2001 22:09
Subject: FW: MediaEnforecer

Here is the media enforcer for evaluation.

Lets stop this bastard ;-)

----Original Message----
From: Darrell Smith [mailto:darrell@indirect.com]
Sent: Friday, June 29, 2001 20:58
To: Niklas Zennstrom
Subject: RE: MediaEnforecer

----Original Message----
From: Niklas Zennstrom [mailto:niklas@fasttrack.nu]
Sent: Friday, June 29, 2001 1:22 AM
To: Darrell Smith

Subject: RE: MediaEnforecer
Resend it but rename it to ".excel" Outlook has decided ti is harmful for me to receive .exe files

----Original Message----
From: Darrell Smith [mailto:darrell@indirect.com]
Sent: Friday, June 29, 2001 08:21
To: Niklas Zennstrom
Subject: MediaEnforecer

Install MEProSetup first then MEKazaaSetup.

Darrell

MusicCity.com FIVE YEAR SUMMARY					
			2001	2002	2003
Total	Morpheus	Downloads	1,215.00	2,550,000	3,950,000
Total	MusicCity	Vistors	5,000,000	10,000,000	12,000,000
Revenues					
	Audio Ads		$ 7,654,500	$ 26,611,200	$ 37,013,760
	Rich Media Ads		$ 20,412,000	$ 80,640,000	$109,670,400
	Sponsorship Gateways		$ 1,701,000	$ 6,720,000	$ 11,424,000
Total Revenues			$ 29,967,500	$113,971,200	$158,108,160
Cost of Goods					
	Streaming Media Ads/Content (Digital Island)		$ 1,500,000	$ 5,851,200	$ 9,947,040
	Rack Charges (Digital Island)		$ 90,600	$ 171,000	$ 260,000
	Morpheus Media Streaming		$ 2,794,500	$ 11,040,000	$ 18,768,000
Total Cost of Sales			$ 4,385,100	$ 17,062,200	$ 28,975,040
Gross Profits			$ 25,582,400	$ 96,909,000	$129,133,120
Expenses					
	Admin/operations		$ 2,807,709	$ 4,913,491	$ 8,598,609
	Product Development		$ 1,044,807	$ 1,828,413	$ 3,199,722
	Sales/Marketing		$ 2,802,500	$ 4,203,750	$ 6,305,624
Total Expenses			$ 6,655,016	$10,945,654	$ 18,103,955
Net Income (pre-tax)			$18,927,384	$85,963,346	$ 11,029,165

1515017: Documents for conference call discussion

ItemID: 1515017

From: Dana McElwee
To: Trey Bowles; Dana McElwee; Steve Griffin; darrell2@home.com; margaux@streamcast.ws; Margaux Schaffer; paul@streamcast.ws; matt@1dev.com; Chris Goodrich at AOL; Elizabeth Cowley; Heather Waters; kelly@oneilcomm.com; Shane Corum; Jon Badgett; Betty Gailbreath; Jason Geraci; Sean Hunt
CC:
BCC:
Subject: Documents for conference discussion
Sent Date: 2001-Dec-05 13:26:34
Received Date: 2001-Dec-05 13:26:02

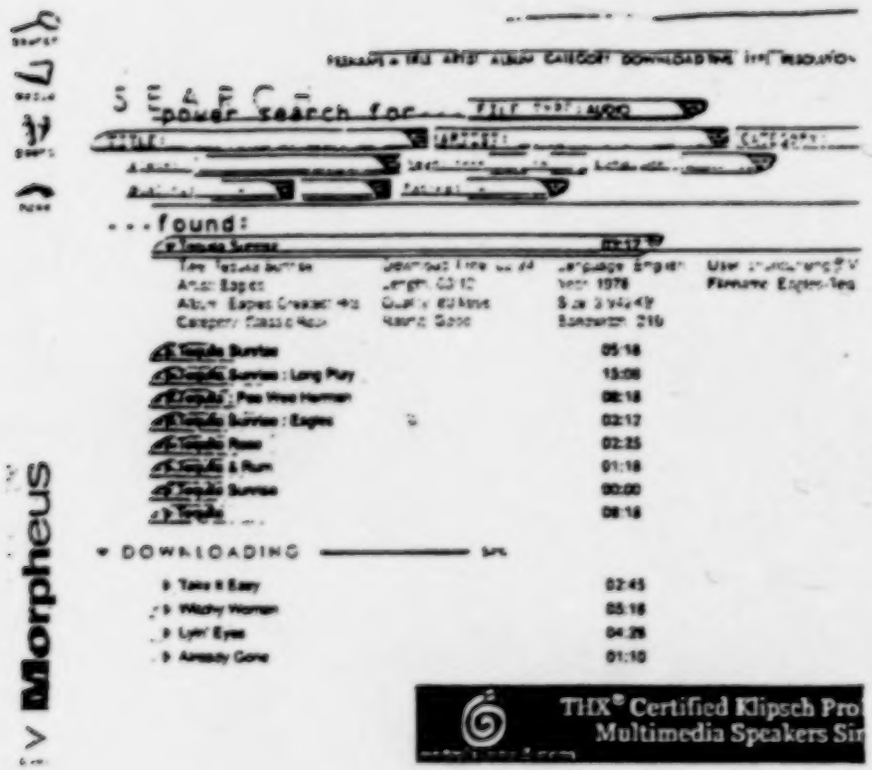
Attachments
EmbeddedMessage
OPTIONS.JPG
SEARCH.JPG
freshgear.jpg
HOME.JPG
OPTIONS.JPG
SEARCH.JPG
WHATSNEW.JPB
WHATSNEW.JPG
HOME.JPG

All -

Attached are the documents we will review and discuss on Monday's conference call. Please call me with any questions.

Thanks y'all -

Dana



BEST AVAILABLE COPY

1530835 Next Morpheus Beta {F}

ItemID: 1530835

From: Rob Adamson
To: Darrell Smith
CC:
BCC:
Subject: Next Morpheus Beta {F}
Sent Date: 2000-Feb.-12 12:42:13
Received Date: 2000-Feb.-12 12:43:01

Attachments:
mediasection.jpg

Hi Darrell,

Here is the snapshot.

Rob
___Original Message _____
From: Darrell Smith
To: Rob Adamson
Sent: Tuesday, February 12, 2002 12:20 PM

Hi Rob,

Can you send me a screen shot of the media section? I need to make sure we are thinking in the same direction on functionality.

I'll call you after I get the screen shot.. Send Paul a copy also.

Thanks,

Darrell
___Original Message _____
From: Rob Adamson
Sent: Tuesday, February 12, 2002 12:05 PM
smithdarrell112@home.com; kirk headley; Paul Panetti; Steve Russell
Subject: Next Morpheus Beta

Hi Darrell,

We are making good progress on the Media Section and I found and fixed a problem that was causing the project hang sometime. We could probably post another beta tomorrow if you want unless there is new artwork that needs implementing. Was are re-using the web browse section control for media previews of things like .doc files to avoid yet another ie control instance.

Rob

1570734: please call me{F}

ItemID: 1570734

From: Jody Pace
To: Trey Bowles
CC:
BCC:
Subject: please call me{F}
Sent Date: 2002-Feb-21 15:17:55
Received Date: 2002-Feb-21 15:17:55

Attachments
Gracenote P2P Announcement - FINAL 11.06.01.pdf

Trey -

What this is, is a technology that will allow Morpheus to see what our users are sharing so that in turn we can "tie into a rights payment infrastructure." I know this is something we DO NOT want to do, but am not sure how I need to word that. Suggestions? DO we need a phone call?

Thanks!

Jody

From: Stephen White
To: Jody Pace
Sent: 2/21/2002 5:08 PM
Subject: RE: please call me

Jody,

We would need to discuss the particulars of a solution to be able to give you pricing.

We do license our data, but we also have built an entire solution specifically for peer-to-peer companies (built for

Napster) that includes multiple forms of identification (including waveform analysis) that we are very interested in speaking to you about. It is built on the largest database of audio metadata in the world (that includes all the misspellings submitted to our system by end users that are very useful in identification of user generated files) that includes 15+ million tracks and 1.3 million albums. I have included the press release regarding the solution for you.

Our company specializes in audio identification. We have deep development expertise in this area and believe we are uniquely positioned to help Streamcast deploy a system that enables file identification and rights payment.

We would be very willing to come talk to you about this in more detail at your offices. Please let me know if you are interested and I will set up the meeting. I would want to bring my CEO, CTO, and SVP of development to make sure we were able to cover all your questions

Thank you,

Stephen

Stephen White
Director of Emerging Technology
Gracenote
510-849-2332 X238
swhite@gracenote.com

----Original Message----
From: Jody Pace [mailto:jody@streamcast.ws]
Sent: Thursday, February 21, 2002 3:02 PM
To: Stephen White
Subject: Re: please call me

Stephen,

I am sorry it has taken me so long to get back to you, but we are researching a lot of different opportunities.

I do not think I am clear on what you are proposing. Is your database something we would license? If so what kind of cost structure are you suggesting?

Thank you for your interest!

Jody Pace

----Original Message----

From: Stephen mailto:swhite@gracenote.com White
To: Jody Pace mailto:jody@streamcast.ws
Sent: Thursday, February 21, 2002 11:09 AM
Subject: RE: please call me

Hi Jody,

I haven't heard back from you regarding the mail I sent you last week (below). We would like to set up a meeting with your team to discuss our technology and database and to see if there are ways we can help you.

Please let me know if you are interested.

Thanks,

Stephen

----Original Message----
From: Stephen White
Sent: Friday, February 15, 2002 2:14 PM
To: 'Jody Pace'
Subject: RE: please call me

Hi Jody,

Thanks for getting in touch with me. Gracenote (www.gracenote.com<http://www.gracenote.com>)

specializes in audio recognition and has the largest database in the world of audio metadata (13 million tracks, 1.7 million albums). We have developed a peer-to-peer audio file identification solution based on our core CDDB recognition platform that we would be interested in discussing with you.

We worked with Napster early on to help them identify the audio being traded over their network and tie into a rights payment infrastructure and have worked with other peer-to-peer companies to help them develop identification and payment systems.

We would be very interested in meeting with the appropriate people at StreamCast to discuss further. Please let me know if a conversation of this nature is of interest to you and we'll set it up.

Thanks,

Stephen

Stephen White
Director of Emerging Technology
Gracenote
510-849-2332 X238
swhite@gracenote.com

----Original Message----
From: Jody Pace [mailto:jody@streamcast.ws]
Sent: Friday, February 15, 2002 1:33 PM
To: Stephen White
Subject: FW: please call me

Hi Stephen,

Thank you for your interest in working with StreamCast Networks. We would be interested in hearing more about your company and any ideas you have for business

development opportunities between StreamCast and Morpheus.

Sincerely,

Jody Pace
Business Development
StreamCast Networks
www.MusicCity.com

----Original Message----
From: Stephen White [mailto:swhite@gracenote.com mailto:swhite@gracenote.com]
Sent: Wednesday, February 13, 2002 5:19PM
To: bizdev@streamcast.ws
Subject: please call me

Hello,

Can someone please give me a call regarding potential partnership opportunities.

Thank you,

Stephen

Stephen White
Director of Emerging Technology
Gracenote
510-849-2332 X238
swhite@gracenote.com

Incoming mail is certified Virus Free.
Checked by AVG anti-virus system (http://www.grisoft.com http://www.grisoft.com).
Version: 6.0.307 / Virus Database: 168 - Release Date 12/11/2001

Outgoing mail is certified Virus Free.
Checked by AVG anti-virus system (http://www.grisoft.com http://www.grisoft.com).
Version: 6.0.307 / Virus Database: 168 - Release Date 12/11/2001

Gracenote P2P Announcement - FINAL 11.06.01.pdf

DATE:	Oct. 2, 2001
CLIENT:	Activision
PRODUCT	Tony Hawk's Pro Skater 3
CLIENT CONTACT:	Lori White, Ignited Minds 310.881.8812
ADDRESS:	Santa Monica, CA
PROVIDER CONTACT:	Patrick Barry, Brilliant Digital, 818.515.1507, pbarry@bde.3d.com
SUBMISSION DEADLINE:	Oct. 3, 2001
FLIGHT DATE:	Oct. 30, 2001 - Nov. 30, 2001

CAMPAIGN OVERVIEW

Activision will launch the much anticipated Tony Hawk Pro Skater 3 for title for the PS2, PS1, and GameCube in November 2001. Activision's primary objective is to build impact brand awareness of the game to a young, male, music enthusiast in order increase sell-through at the retail level. Such branding will be achieved by incorporating actual character and gameplay elements into online ads, thus providing the true, authentic "look and feel" of the game. Sound will also play an important branding role in this music-oriented title.

Concept for the campaign:
A Brilliant 3D ad unit will be created that gives gameplay experience to the online user. Each participant will be prompted to "Click Skater For Tricks" throughout the ad. Each time the user does so, Tony Hawk will perform accordingly. If the user does not click, tricks will be performed automatically. Dynamic camera angles will be utilized to give the user an authentic gameplay feel. During the entire promotional message, background music is prevalent.

ABOUT THE BRILLIANT ADVERTISING NETWORK

The Brilliant Ad Network consists of top sites frequented by rich media enthusiasts who seek interactive entertainment. Sites within the network include Warner Bros., Lycos, and Netbroadcaster, and Morpheus. Morpheus is the biggest alternative media network reaching tens of millions of active rich media entertainment seekers in the USA. The network's combined USA audience is now greater than 25 million people and growing at the rate of approximately 150,000 new unique users each day. This network has over 100 million exposures available each day. At any one time, there are between 600,000 to 1,000,000 simultaneous users searching for and exchanging music, videos and other entertainment files.

Combined with the power of Brilliant Digital's 3D technology, the reach of this targeted network offers Activision a strong, impact branding platform for game titles with a reach of over 25 of million 14-34 avid users who avidly participate in interactive entertainment. Brilliant Digital can enhance the user experience by means of a 3d animated online ad, thus helping expose the game to millions of targeted buyers.

OBJECTIVE

Build brand awareness of Activision's new and upcoming Tony Hawk Pro Skater 3 title.

TARGET AUDIENCE

Men 14 - 34

PROPOSAL SPECIFICS

POSITIONING/PROGRAM OPTIONS

Tony Hawk Pro Skater 3: Brilliant Banner and HTML Baner impressions across Morpheus. (WB, MTV, etc. TBD dependent on distribution of the player and client wishes).

1,000,000 b3d banner impressions - 400x400 pop up interstitial

1,000,000 b3d banner impressions - 468x60

900,000 HTML banner impressions - 468x60

Production of two animated 3D ads by Brilliant Digital

Totals:

Impressions: 2,900,000

$23,050 media buy

$ 6,000 2x b3d productions (400x400 and 468x60)

Total Cost: $28,000

Benefits Summary (as compared to music site MP3.com):

Daily Reach: Morpheus has 2.5 million users v. MP3.com's 0.5 million users

Targeted Reach: Morpheus users are highly concentrated within the 14-34 age demo, with a 58% male skew.

Richer Media: Morpheus pre-caches rich media, TV-like ads up to 80 k with no buffering or load delays while MP3.com limits their ad file sizes to 12 k.

Audio Quality: Morpheus offers music tracks with CD-quality at 128 KPBS sound while MP3.com offers sound at only 24 KPBS. This lo-fi sound is a major downside to young music fans.

Better Music Programming: Morpheus contains thousands of music and entertainment files while MP3.com's roster of offerings is limited. For example, a search on Morphus resulted in pages of Madonna tracks, while the same search on MP3.com resulted in only two Madonna tracks (one English, one Spanish).

Ad Impact: Morpheus offers the 400x400 pop-up size in b3d rich media, while MP3.com does not offer the size of impactful ad unit

• • • •

"Small Record Labels Say Radio Tunes Them Out" - LA Times, 16 September 2001

Can't get a break on Radio?

Morpheus is now the biggest alternative network reaching millions of listeners in the USA. Morpheus audience is now greater than 15 million people and growing at the rate of around 2 million new browser downloads each week.

This is a great opportunity to establish a relationship with the folks at Morpheus, partnering with them to promote the new tracks that you want to get in front of Millions of people.

Morpheus has over 75 million advertising impressions available each day. At any one time there are around 600,000 simultaneous users exchanging music, video and other files.

Here is a suggestion. For an investment starting at $5,000 you can reach your audience, sampling music and promoting web play of your chosen tracks. For campaigns running in October Morpheus will highlight your artist and track on their home page for 24 hours representing approximately X (WE NEED TO CONFIRM THIS NUMBER) million exposures.

There are only 30 available slots to do this during the month and 8 have already been snapped up.

The deal is simple.

Spend $12,000 on the Morpheus network using the latest 3D web video technology used by Sum41, Ja Rule and DMX.

You get:

1. A 30 second web video advertisement
2. 500,000 x 30 second ad's
3. An option to increase media at exceptionally favorable rates
4. *24 hour home page highlight at Music City.com (Morpheus Home Page) - X million individual exposure

* This option is only available to the first 30 campaigns signed up during October.

Get on board now. Morpheus are taking important steps to help independent labels to rise above the noise, get noticed and tune back into the audience supporting your artists in stores and concert venues around the country.

Contact XYZ for more information.

Tyler Nilson, 06:03 PM 2/10/2002 -0800, Re: cannot find any software on Grokster

To: "Tyler Nilson" windstar2465@SoftHome.net
From: Support support@grokster.com
Subject: Re: cannot find any software on Grokster
Cc:
Bcc:
Attached:

We do not have a central server for the network. If we did, we would be out of business just like Napster. And why are you complaining? Everything that you get out of our network is free. You could always do the legal thing and go buy the game, we suppose?

Cheers

At 07:57 PM 2/10/2002 -0600, you wrote:

Is there anyway to get it from your server de to that is where the lies are kept or do you have your own download (Black and White) that I can get ALL I WANT IS THE GAME BLACK AND WHITE!!!!!!!!!!!!!!!!!!!! I really don't know how you don't have a way to do this

----Original Message----
From: Support
To: Tyler Nilson
Sent: Sunday, February 10, 2002 7:42 PM
Subject: Re: cannot find any software on Grokster

Sorry, but we have absolutely no control over what users share in the network nor do we know what they are sharing. You will just have to keep trying.

Cheers

At 07:25 PM 2/10/2002 -0600, you wrote:

I cannot find any of the software that I've seen before on my dial up I decided that I would wait to download them when I got my cable for internet. Black and White. The Sims Hot Date, and Tribes 2 were all on Grokster when I looked them up before now, I cannot find them. what do you suggest doing because users that have these softwares are not on but maybe a few minutes at a time. Is there any way to do a timed or automatic search? Or maybe you could download it from them and then I could then find it from you? Either way I cannot spend each minute of searching for it praying that the people will be online if I could, at least get those three software titles then I will be satisfied. Please e-mail back As soon as possible because I would really like to keep using Grokster to get my software because the one that I actually downloaded during dial-up worked extremely well.

Support
support@grokster.com
http://www.grokster.com
Grokster.Next Generation File Sharing
Tell your friends about Grokster at http://www.grokster.com/tellafriend.html

Support
support@grokster.com

Tyler Nilson, 06:03 PM 2/10/2002 -0800, Re: cannot find any software on Grokster

http://www.grokster.com
Grokster.Next General File Sharing
Tell your friends about Grokster at http://www.grokster.com/tellafriend.html

Lynn Batt, 12:16 PM 2/14/2002 – 0800.Re:search results

To: Lynn Batt <katsura@shaw.ca>
From: Support <support@grokster.com>
Subject: Re: search results
Cc:
Bcc:
Attached:

At 12:02 PM 2/14/2002 -0800, you wrote:

> I got 4 files found for "Big Fat Liar" but only 2 in the search field. Why? How can I find the other 2? Thank you for your time and attention to this small problem.

Hi.

Did either of them have a small "+" to the left side? If so, then some of them were exactly the same and that is the best one to download.

When you are downloading files, these are the status messages and what they mean:

"Connecting" means that Grokster is attempting to complete a connection to the other users' computer(s).

"Downloading" means that the file is downloading from the other users' computer(s) to yours.

"Remotely Queued" means that the other user(s) has too many requests for files and you are in line to receive the requested file. You might consider typing to download from another source.

"Pause" means that you have paused the download. Use Resume to continue downloading.

"More Sources" means that the other user(s) that you had been downloading from can no longer be reached by your computer through the Grokster network or that it has dropped this particular connection. Try Resume or Find More Sources for Download or search for the same file again and download from another source.

"Failed" means that the download has had an unspecified failure. Try Resume and if that does not work, then locate and download from another source.

"Completed" means that the download was successful.

Cheers

Support

support@grokster.com
http://www.grokster.com
Grokster: Next Generation File Sharing
Tell your friends about Grokster at http://www.grokster.com/tellafriend.html

---

Printed for doowop <doowop@prosapia.com>

wboyce@hfx.eastlink.ca. 03:04 PM 3/18/2002 -800, Re: movies

To: wboyca@hfx.eastlink.ca
From: Support <support@grokster.com>
Subject: Re:movies
Cc:
Bcc:
Attached:

At 06:03 PM 3/18/2002 -0400, you wrote:

> you don't have some of the brand new movies that are still in theaters i.e: resident evil-when I downloaded it I got some old boxing movie. I wanted the new 1 that's still in theaters.
> also is it normal to have speeds at 2.0 or.56kb when downloading a movie if I have cable internet.
> Are all the movies fussy like lord of the rings because that was kind'a fussy and i couldn't make out some of the movie. That's all I want to know. I hope you can answer some of my questions.
> Thanks bye☺

Hi.

Upload and download speeds are a function of the speed of each users connection as well as how busy each user is, among many other factors. When possible select files that have a small"+" to the left as this indicates multiple sources and Grokster will pull from several of them simultaneously, thus speeding up the download. Remember that many users are on dial up connections which operate very slowly with large files.

This program may also be of help:

http://www.doc.ic.ac.uk/-mab201

You can automate the researching process by using this program. This program causes all items in your download window to search for more sources every five mins. Please be aware, however, that it re-searches files not matter what their status. This applies to queued, paused and even completed files. So this has its uses, but be careful. The programmer claims he will fix this in later versions, but until then, we suggest doing only one download at a time if using this tool.

Cheers

Support

support@grokster.com
http://www.grokster.com
Grokster: Next Generation File Sharing
Tell your friends about Grokster at http://www.grokster.com/tellafriend.html

Printed for doowop <doowop@prosapia.com

Lynette Marie Ann Long, 10:25 PM 3/18/2002, Re:Found A VIRUS on your site

To: "Lynnette Marie Ann Long" <lynettebustamante@hotmail.com>
From: Support <support@grokster.com>
Subject: Re: Found A VIRUS on your site
Cc:
Bcc:
Attached:

At 12:17 AM 3/19/2002 -0600, you wrote:

I found "LOVE LETER" virus on your site I was downloading L.C.P tilt a whirl, Neil Sedaka Calendar Girl, Christina Aguilara Genie in a bottle and Beach Boys don't worry baby. I am upset I got this, but I managed to contain it, I am telling you so that you can do something before it destroys tons of files. Also my user name is Nettie@grokster.com and it will not let me sign in and I know the name is 100% correct.
Thanks for your time
Lynette aka Nettie

Get more from the Web, FREE MSN Explorer download: http://explorer.msn.com
Hi!

Thank you for your email regarding the inappropriate content. Due to the design of the network, we neither have control of who uses the system nor what is shared through it. Further we do not know who the users are nor what files they are sharing nor what the contents are of the files they are sharing. Since we do not have control of the users or files, we cannot take any action to stop them. Remember that the

network connects your computer directly to the other users computer through the network, not through any servers that Grokster may have.

You can start Grokster and go to Tools/Options/Filter and substantially block certain types of content that you might find offensive.

Cheers

Support
support@grokster.com
http://www.grokster.com
Grokster: Next Generation File Sharing
Tell your friends about Grokster at http://www.grokster.com/tellafriend.html

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Printed for doowop <doowop@prosapia.com

Shadowdancer 1130@aol.com, 05:06 PM 2/28/2002-800, Re: Virus Alert

To: Shadowdancer1130@aol.com
From: Support <support@grokster.com>
Subject Re: Virus Alert
Cc:
Bcc:
Attached:

At 08:04 PM 2/28/2002 -0500, you wrote.

You have a virus (loveletter) under Elton John and Billy Joel titled I guess that's why they call it the blues. I unfortunately downloaded it to find out and wanted to warn you.

P. Rodriguez

Hi!

Thank you for your email regarding the inappropriate content. Due to the design of the network, we neither have control of who uses the system nor what is shared through it. Further we do not know who the users are nor what files they are sharing nor what the contents are of the files they are sharing. Since we do not have control of the users or files, we cannot take any action to stop them. Remember that the network connects your computer directly to the other users computer through the network, not through any servers that Grokster may have.

You can start Grokster and go to Tools/Options/Filter and substantially block certain types of content that you might find offensive.

Cheers

Support
support@grokster.com
http://www.grokster.com

Grokster: Next Generation File SharingTell your friends about Grokster at http://www.grokster.com/tellafriend.html

Printed for doowop <doowop@prosapia.com

asad.02:20 PM 3/2/2002 -0800, Re: I can't watch long movies on Grokster

To: "asad" <badboyz71@hotmail.com>
From: Support <support@grokster.com>
Subject: Re: I can't watch long movies on Grokster.
Cc:
Bcc:
Attached

At 02:10 PM 3/2/2002 -0500, you wrote:

> i downloaded fast and the furious and mummy returns and i can only hear the sound, I can't watch the video. What would I have to download to watch movies.
> Badboyz71@hotmail.com

Sir!

Grokster uses Windows Media Player as its media player. Please get it and install it from:

http://www.microsoft.com/windows/windowsmedia/en/download/default.asp or

http://download.cnet.com/downloads.0-1896413-100-5948260.html?laq=st.dl.10001-103-1.lst-7-2.5948260

It is important to also install all the latest codecs and that can be done by going to www.divx.com and downloading and installing DivX4.0. This will install all the latest codecs into your computer that all of your media players then use.

For help getting Windows Media Player configured:

http://help.yahoo.com/help/us/events/events-19.html

Some helpful information regarding video files may be found at:

http://www.microsoft.com/windows/windowsmedia/default.asp

http://www.vcdhelp.com/

http://www.vcdhelp.com/vcdtools.htm

http://www.jmcqowan.com/avi.html

Cheers

Support
support@grokster.com
http://www.grokster.com
Grokster: Next Generation File Sharing
Tell your friends about Grokster at
http://www.grokster.com/tellafriend.html

Printed for doowop <doowop@prosapia.com

IceGoddesss@cs.com, 02:55 PM 3/2/2002 -0800, Re: VIRUS IN SOME DOWNLOADS ——User A

To: IceGoddesss@cs.com
From: Support <support@grokster.com>
Subject: Re:VIRUS IN SOME DOWNLOADS ——USER ADDY INSIDE
Cc:
Bcc:
Attached:

At 05:15 PM 3/2/2002 -0500, you wrote:

> I downloaded a file that was titled The world's Greatest by R.Kelly . . . and it was the loveletter.vbs worm virus..... luckily I had virus protection, unfortunately everyone does not.... this is the email to the person who is sharing the file: jappert@kaZaa.com

Sincerely,
Annette

Hi!
Thank you for your email regarding the inappropriate content. Due to the design of the network, we neither have control of who uses the system nor what is shared through it. Further we do not know who the users are nor what files they are sharing nor what the contents are of the files they are sharing. Since we do not have control of the users or files, we cannot take any action to stop them. Remember that the network connects your computer directly to the other users computer through the network, not through any servers that Grokster may have.

You can start Grokster and go to Tools/Options/Filter and substantially block certain types of content that you might find offensive.

Cheers
Support
support@grokster.com
http://www.grokster.com

Grokster: Next Generation File SharingTell your friends about Grokster at http://www.grokster.com/tellafriend.html

Printed for doowop <doowop@prosapia.com

GR 08333

Cyberowl2003@aol.com, 12:26 PM 3/9/2002 -0800, Re: saving files

To: Cyberowl2003@aol.com
From: Support <support@grokster.com>
Subject: Re: saving files
Cc:
Bcc:
Attached:

At 03:13 PM 3/9/2002 -0500, you wrote:

> is it possible to save a divx full length movie file on a cdr for a back up in case my pc goes down i tried it on a another file share network and i couldn't save a recent movie the wedding planner & meet the parents thank you r roberson

Hi,

There are many tools available to burn CD's with. We recommend that you read and follow the instructions that came with your CD-RW drive. Then use a program like MP3Master to make it easier. Check it out at:

http://www.mp3mastercdburningsoftware.com/grokster/?hop=groksales.smoke932

Cheers

Support
support@grokster.com
http://www.grokster.com
Grokster: Next Generation File Sharing
Tell your friends about Grokster at http://www.grokster.com/tellafriend.html

niklas@fasttrack.nu, 08:52AM 2/15/2002-0800, Grokster upgrade

To: niklas@fasttrack.nu
From: Henry Wilson ‹relations@grokster.com›
Subject: Grokster upgrade
Cc:
Bcc:
Attached:

Hi Niklas,

Per our contract, please forward to us the latest upgrade that includes all the current bug fixes, no requirement for a registration server and any other improvements/upgrades that are currently available.

Cheers

Henry

Henry Wilson
relations@grokster.com
http://www.grokster.com
Grokster: Next Generation File Sharing
Tell your friends about Grokster at http://www.grokster.com/tellafriend.html

SOFTWARE LICENSE AGREEMENT

This Software License Agreement (this "Agreement") is entered into as of May 31, 2001 by and between Consumer Empowerment B.V., an Amsterdam-based corporation formed in the Netherlands, which shortly will be changing its name to FastTrack B.V. ("FastTrack"), and Swaptor, Ltd., a Nevis corporation formed in Nevis, West Indies ("Swaptor").

WHEREAS, Swaptor wishes to enter into a relationship with FastTrack in order to license, on a nonexclusive basis (the "License"), certain FastTrack software (the "Software").

WHEREAS, FastTrack is willing to enter into such a relationship with Swaptor on the terms and conditions set forth in this Agreement.

NOW, THEREFORE, the parties hereby agree as follows:

1. Software Functionality. The functionality of the Software which is the subject of the License (the "Software") is described in Exhibit 1 to this Agreement.

2. Grant of License.

2.1 *Grant.* FastTrack hereby grants to Swaptor a nonexclusive License to:

(a) use the Software in compiled code form for purposes internal to Swaptor only, and

(b) market the Software in compiled code, to users for use by such users worldwide.

No other rights are granted to Swaptor.

2.2 *Representation and Warranty.* FastTrack represents and warrants that FastTrack has the authority to grant the License and that the grant of the License does not violate any other agreement to which FastTrack is a party.

2.3 *Copyright No Transfer of Title.* The Software is copyrighted and licensed (not sold). FastTrack does not transfer title to the Software to Swaptor.

2.4 *Trademarks.* Swaptor will have the right, during the term of this Agreement (as defined in Section 3), to use all FastTrack trademarks and identifying slogans, which FastTrack uses in connection with the Software (the "Marks"). Swaptor acknowledges that the Marks are the exclusive property of FastTrack. Swaptor will have no interest in the Marks except as is expressly provided in this Agreement, and Swaptor's right to use the Marks will cease immediately upon the effective date of termination of this Agreement.

3. *Term of Agreement.* The initial term will be six (6) months (the "Initial Term"), which will commence on the date this Agreement is executed by both parties (the "Effective Date"). Swaptor will have the right to extend the Initial Term for an additional one (1) year (the "First Term Extension") by giving notice not later than thirty (30) days prior to the expiration of the Initial Term. Swaptor will also have the right to extend the First Term Extension for an additional one (1) year (the "Second Term Extension") by giving notice not later than sixty (60) days prior to the expiration of the First Term Extension. The Initial Term, the First Term Extension (if any) and the Second Term Extension (if any) shall be called the "Term". FastTrack agrees that during the last six (6) months of the Second Term Extension (if any) it will negotiate in good faith a possible extension of the Term based on mutually acceptable economic terms. If Swaptor fails to pay to FastTrack per this

paragraph at least USD $15,000 revenues per started 100,000 registered active users per calendar quarter, starting with the calendar quarter ending December 31, 2001, then FastTrack has the right not to extend the contract according to this paragraph.

4. *License Fee*. In consideration for the grant of the License, Swaptor will pay FastTrack a one-time license fee (the "One-time License Fee") of US $2,500, payable as follows:

(a) 100% upon successful deployment of the Software.

5. *Royalties*. In consideration for the grant of the License, Swaptor will also pay FastTrack, within thirty (30) days of the close of each Calendar Month, royalties (the "Royalties") of sixty percent (60%) on the "gross revenues" collected by Swaptor that were derived from any products or services incorporating the Software, including but not limited to revenues derived from advertising, user fees, affiliate commissions or any other source. "Gross revenues" will mean gross revenues less sales commission costs (e.g., commissions from advertisement sales agencies and others), calculated on a cash basis.

6. *Taxes*. Swaptor will pay all sales, use and excise taxes, and any other assessments in the nature of taxes however designated, on the Software or its license or use, on or resulting from this Agreement or on any amount payable or any services furnished under this Agreement, exclusive of taxes based on FastTrack net income, unless Swaptor furnishes FastTrack with a certificate of exemption from payment of any such taxes which is in a form reasonably acceptable to FastTrack.

7. *Obligations of FastTrack.*

7.1 *Customization of the Software.* FastTrack will make a one-time customization of KaZaA Media Desktop ("KMD"), including adding (a) Swaptor graphics and logotypes and (b) the ability of Swaptor to modify text related to the name of the Software, i.e., "KaZaA", links to affiliates, banner tag as well as have the start page and other web pages point to a site of its own.

7.2 *New Functionality.* The first release of KMD delivered to Swaptor will include all the functionality of the current KMD (version 1.2). In addition, FastTrack plans to develop new functionality for KMD, which FastTrack will automatically provide to Swaptor at no extra cost in its customized version of KMD (examples of planned features are summarized in Exhibit 2). If Swaptor has additional requirements in terms of features and functionality, FastTrack will be able to develop these on behalf of Swaptor; provided, however, that the cost for such modifications will be the responsibility of Swaptor. FastTrack remains the right to determine which future software to be included in this license agreement.

7.3 *Necessary Software Elements.* FastTrack agrees to provide Swaptor with the necessary software elements to run KaZaAServer functionality on Swaptor's own servers in the Swaptor data center, as well as the information and assistance necessary to set up and configure the servers.

8. *Obligations of Swaptor.*

8.1 *Customer Relationship.* Swaptor will be the service-provider to its customers and users with full ownership of the customer relationship. Swaptor will provide its own hosting facilities to manage that customer relationship.

8.2 *Commercial Arrangements.* Because FastTrack is providing underlying technology only, Swaptor is responsible for all commercial arrangements, banner sales, royalties and liabilities for the content as served up through the Swaptor network.

8.3 *KaZaAServer and SuperNode Seed server.* Swaptor will host and maintain one or more instances of the KaZaAServer and SuperNode Seed server for its users and will be responsible for all equipment and bandwidth costs associated with the operation of those servers. (These two servers can be deployed on the same physical server.)

8.4 *Customer Support.* Swaptor will provide "first-line" telephone, electronic mail or facsimile support of the Software to its customers and act as the primary customer contact, tracking all issues and questions to their resolution and handing bug reports over to FastTrack on a regular basis. Swaptor will forward to FastTrack, in writing by electronic mail or facsimile, technical questions concerning the Software which Swaptor's staff cannot answer and properly documented reports of errors in the Software or External Documentation.

8.6 *Copyright and Trademark Notices.* Swaptor will include, and not modify, the copyright and trademark notices of FastTrack and its third-party licensors found in the Software object code and the External Documentation and will include trademark notices as reasonably requested by FastTrack when Swaptor uses FastTrack's trademarks elsewhere.

8.7 *Terms for Sublicense Agreements.* Swaptor will include the provisions contained in Exhibit 3, in all material respects, in each and every sublicense agreement of Swaptor, and will require their inclusion in each and every license agreement of customers of Swaptor, covering products which incorporate the object code form of the

Software ("Sublicense Agreements"). Swaptor will provide a copy of its standard Sublicense Agreement to FastTrack to review not less than 48 hours prior to generally implementing its usage. Any material variance to the provisions contained in Exhibit 3 must be approved in writing by FastTrack.

9. *Mutual Obligations.*

9.1 *Confidentiality of this Agreement.* Neither party will disclose the specific contents of this Agreement to any third party, except as may be required by applicable law, provided, however, that either party may disclose information on a confidential basis to its attorneys, accountants, potential investors and lenders having a need to know.

9.2 *Technical Interface.* FastTrack and Swaptor each will maintain a named person as the primary technical interface between the parties for the administration of this Agreement.

9.3 *Publicity.* Neither party will use the name of the other party or announce the existence of this Agreement in any advertising or other promotional activity without the prior written consent of the other party, which consent will not be unreasonably withheld or delayed.

9.4 *Right of First Refusal.* FastTrack will have the first right of refusal to match any credible offer that the other party may receive from a third party that would result in replacement of this contract. If Swaptor receives such an offer will notify the other party in writing as soon as is practical.

10. *Network and Customer Relationship.*

10.1 *The Network.* Swaptor and FastTrack will work jointly together so that the Swaptor network and the FastTrack network (KaZaA net) will integrate and appear to

users to be one network (the "Network"). The Network will by default be inter-operational; users on the Swaptor network will have access to the content of the FastTrack and other interconnected networks and vice versa, and similarly a FastTrack or other interconnected network user will be able to communicate with a Swaptor network user and vice versa.

10.2 *Other FastTrack Licensees*. Other companies licensing the Software or other FastTrack technology will not have access to the Network or the Swaptor network users without the written consent of Swaptor.

10.3 Disabling the Network. Each party reserves the right to disable the Network by disabling its connection to the Network if it deems such action necessary to maintain the integrity of its network or out of concern for its users; for example, if the disconnected party's users are sharing a high percentage of bogus file or in other ways acting in a way that may be harmful or harassing to other users. The party wishing to disconnect will, however, not take such step without consulting with the other party and attempting in good faith to find a solution to the problem.

10.4 Swaptor's Customer Relationship. Swaptor will own the customer relationship of its customers 100%. Swaptor's end-users will not have to know anything about FastTrack, except license information which is specified in 10.6.

10.5 User Abuse. Swaptor will be responsible for dealing with abuse arising from Swaptor's user base. Both parties will agree on guidelines for dealing with abuse issues.

10.6 FastTrack trademarks in the Software. Swaptor will display a logotype and text in the "About" box, a 100x30 pixel gif button and text on the start page as well as text in Sublicense Agreements. These elements will be provided by FastTrack.

11. Blank

12. *Ownership of the Software*. Swaptor claims and will claim no interest in the title of the Software or its copyrights, including any revision, enhancement, modification, translation, abridgement, condensation or other form in which the Software may be recast, transformed or adapted, whether authored by FastTrack or Swaptor or authored jointly, and whether authored before, during or after the Term.

13. *FastTrack Right to Audit*. FastTrack will have the right to audit, at its expense, Swaptor's books and records concerning Swaptor's obligations to pay Royalties and to include the provisions of Exhibit 3 in Sublicense Agreements. FastTrack may conduct such audits from time to time, but no more frequently than once every six (6) months, during normal working hours and with reasonable advance written notice. FastTrack may exercise its audit right solely through an independent certified public accountant. If any audit determines that Swaptor has underpaid FastTrack by an amount greater than ten percent (10%) of the payments due FastTrack during the period being audited, then Swaptor will bear the reasonable costs of such audit in addition to its obligation to make immediate full payment of the underpaid amount.

14. *Warranty*.

14.1 *Software Warranty*. FastTrack warrants that during the Term the then current unaltered release of the Software, when properly used in its proper operating environment, will operate according to the then current External Documentation. FastTrack (a) will use best reasonable efforts to respond and provide solutions to documented reports of errors in the Software consistent with the provisions of Exhibit 5 and (b) otherwise will perform according to the provisions of Exhibit 5.

14.2 *Exclusion of Warranties.* EXCEPT AS PROVIDED IN THIS SECTION, FASTTRACK EXTENDS NO WARRANTIES ON THE SOFTWARE SUPPLIED OR SERVICES PERFORMED UNDER THIS AGREEMENT, EXPRESS OR IMPLIED (INCLUDING BUT NOT LIMITED TO IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE).

15. *Limitation of Liability.* IN NO EVENT WILL EITHER PARTY BE LIABLE FOR ANY LOSS OF PROFITS OR OTHER SPECIAL OR CONSEQUENTIAL DAMAGES, EVEN IF THE OTHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

16. *Indemnification.*

16.1 *Indemnification of Swaptor.*

16.1.1 *Indemnification.* FastTrack will defend any claim, suit or proceeding brought against Swaptor, or in respect of which Swaptor may be liable to indemnify its customers, insofar as such claim, suit or proceeding is based on a claim that the Software directly infringes any patent, trade secret, copyright, or other intellectual property right, if FastTrack is notified promptly in writing of any such claim, suit or proceeding and is given full and complete authority, information, and assistance by Swaptor (at FastTrack's expense) for such defense. FastTrack will pay all costs of defending and settling any such claim, suit or proceeding, as well as any damages and costs finally awarded in any such suit or proceeding against Swaptor, or in respect of which Swaptor will owe an indemnity to its customers, but will not be responsible for any compromise made by Swaptor without the consent of FastTrack.

16.1.2 *Removing the Infringement.* In the event that the Software is held in such suit or proceeding to infringe and its use is enjoined, or if in the opinion of FastTrack the Software is likely to become the subject of a claim of infringement, FastTrack, at its own election and at its own expense, will:

(a) procure for Swaptor and its customers the right to continue using the Software,

(b) modify the Software so that it becomes noninfringing, or

(c) replace the Software with noninfringing software.

16.1.3 *Exceptions to Indemnity.* FastTrack will not have any liability to Swaptor under any provision of this Agreement if any infringement or claim thereof is based upon a modification of the Software not introduced by or approved by FastTrack; the interconnection or use of the Software in combination with equipment, software, or other devices not made or approved by FastTrack; or use of the Software in other than those uses recommended by FastTrack.

16.1.4 *No Other Liability.* The foregoing states the entire and sole liability of FastTrack to Swaptor with respect to infringement of patents, trade secrets, copyrights or other intellectual property rights by the Software or any part thereof.

16.2 *Indemnification of FastTrack.*

16.2.1 *Indemnification.* Swaptor will defend any claim, suit or proceeding brought against FastTrack, or in respect of which FastTrack may be liable to indemnify its customers, insofar as such claim, suit or proceeding is based

on a claim that Swaptor's use of the Software, and nothing more, has resulted in the indirect, contributory or vicarious infringement of any copyright by FastTrack, if Swaptor is notified promptly in writing of any such claim, suit or proceeding and is given full and complete authority, information, and assistance by FastTrack (at Swaptor's expense) for such defense. Swaptor will pay all costs of defending and settling any such claim, suit or proceeding, as well as any damages and costs finally awarded in any such suit or proceeding against FastTrack, or in respect of which FastTrack will owe an indemnity to its customers, but will not be responsible for any compromise made by FastTrack without the consent of Swaptor.

16.2.2 *No Other Liability.* The foregoing states the entire and sole liability of Swaptor to FastTrack with respect to infringement of copyrights.

17. *Termination.*

17.1 *Default.* If a party breaches any material term of this Agreement and fails to remedy such breach, (a) within twenty-one (21) days in the case of nonpayment and (b) within forty-five (45) days for other breaches, from the date of receipt of written notice thereof from the nondefaulting party, the nondefaulting party may terminate this Agreement and the License, and may pursue any other remedies available in Section 18. Termination will become effective thirty (30) days after receipt of written notification from the nondefaulting party.

17.2 *Effect of Termination.* In the event this Agreement and the License are terminated, Swaptor will promptly return to FastTrack the original and all copies of all FastTrack object code, technology, derivative software, documentation and other FastTrack property in the possession of Swaptor and its employees and consultants; provided, that Swaptor may keep one copy of the Software

for the sole purpose of providing maintenance to those of its customers who were customers on the date of termination.

17.3 *Payment of Amounts Due.* On any termination of this Agreement, Swaptor will immediately pay to FastTrack all unpaid amounts due under this Agreement.

18. Deleted

19. *Confidential Information.* The parties acknowledge and agree that, as a result of negotiating, entering into and performing this Agreement, each party (a "receiving party") has and will have access to certain Confidential Information (as defined below) of the other party (a "disclosing party"). Each receiving party acknowledges and agrees that misuse and/or disclosure of the Confidential Information of the disclosing party could adversely affect the disclosing party's business. Accordingly, the parties agree that, during and after the Term, the receiving party shall (a) use and reproduce the disclosing party's Confidential Information only to perform its obligations under and for the purposes specified in this Agreement, (b) maintain, and use prudent methods to cause its employees and agents to maintain the confidentiality and secrecy of the Confidential Information, (c) restrict disclosure of the disclosing party's Confidential Information to its employees and contractors with a need to know the Confidential Information to enable the receiving party to perform its obligations under this Agreement, and (d) shall use prudent methods to ensure that its employees and agents do not, disclose the disclosing party's Confidential Information to any third party (including, but not limited to, any third-party consultant, contractor, or agent) without the prior written approval of the disclosing party and without first obtaining such third party's written agreement to maintain the confidentiality of the disclosing party's Confidential Information under the terms and conditions at least as stringent as those set forth in this

Section 12. The receiving party further agrees that, following the expiration or earlier termination of the Term, it shall promptly return to the disclosing party all Confidential Information of the disclosing party or destroy such Confidential Information and so certify in writing to the disclosing party. Notwithstanding the requirements of this Section 12, the receiving party may disclose Confidential Information of the disclosing party to the extent it is required to do so under law or in a judicial or other governmental investigation or proceeding provided that the receiving party gives the disclosing party prompt written notice of the compelled disclosure and cooperates with the disclosing party in seeking a protective order or any other available protections available to limit the disclosure of the disclosing party's Confidential Information.

19.1 Confidential Information Defined. As used in this Agreement, the term "Confidential Information" shall mean: (i) the terms of this Agreement, (ii) all information relating to the disclosing party's business, including, without limitation, computer programs, technical drawings, algorithms, protocols, source and object code, names and expertise of employees and consultants, know-how, processes, trade secrets, inventions (whether patentable or not) and other technical, business, financial, customer and product development plans, Subscriber information, forecasts, strategies, research and information; and (iii) other information relating to either party that is not generally known to the public. Notwithstanding the foregoing, the term "Confidential Information" specifically excludes (a) information that is in the public domain or enters the public domain through no action or default of the receiving party; (b) information that is known to the receiving party without restriction, prior to receipt from the disclosing party from its own independent sources as evidenced by the receiving party's written records; (c) information that the receiving

party receives from a third party known by the receiving party to have a legal right to transmit such information, and not under any obligation of confidentiality; and (d) information that the receiving party can establish, through written records created in the normal course of the receiving party's business, was independently developed by the receiving party's employees or agents without any use of or reference to the disclosing party's Confidential Information.

20. *General.*

20.1 *Waiver.* The failure at any time by either party to enforce, or to exercise any election under, any provision of this Agreement will not be construed as a waiver of such provision or election, or in any way as affecting the validity of this Agreement or any part thereof or the right of such party thereafter to enforce, or to exercise any election under, each and every provision of this Agreement.

20.2 *Choice of Law.* This Agreement will be governed by and construed in accordance with the laws (excluding the law of conflict of laws) of the Netherlands. Any dispute controversy or claim arising out of in connection with this Agreement shall be finally settled before the court of law having its jurisdiction in Amsterdam, the Netherlands.

20.3 *Entire Agreement.* THIS AGREEMENT AND ALL OF THE CONTRACTS, AGREEMENTS, INSTRUMENTS AND OTHER DOCUMENTS REFERENCED IN THIS AGREEMENT CONSTITUTE THE COMPLETE AND EXCLUSIVE STATEMENT OF THE AGREEMENT BETWEEN THE PARTIES CONCERNING THE SUBJECT MATTER OF THIS AGREEMENT, AND SUPERSEDE ALL ORAL OR WRITTEN PROPOSALS, PRIOR AGREEMENTS AND OTHER PRIOR COMMUNICATIONS BETWEEN THE PARTIES BETWEEN THE PARTIES.

20.4 *Amendments*. No representation or promise relating to and no amendment of this Agreement will be binding unless it is in writing and signed by both parties.

20.5 *Severability*. In the event that any of the provisions contained in this Agreement are held to be invalid or unenforceable pursuant to applicable law, including but not limited to the warranty and liability limitations set forth above, then the invalid or unenforceable provision will be deemed superseded by a valid, enforceable provision that closely matches the intent of the original provision and the remainder of this Agreement shall continue in effect.

20.6 *Counterparts*. This Agreement may be executed in two or more counterparts, each of which will be deemed to be an original, but all of which together will constitute one and the same instrument.

20.7 *Assignment*. Neither this Agreement nor any of the rights and obligations hereunder is assignable by either party without the prior written consent of the other party, which consent will not be unreasonably withheld or delayed. Notwithstanding the preceding, Swaptor may assign this Agreement and the License without the prior written consent of FastTrack to (a) a corporation that acquires substantially all of Swaptor's assets or with which it is consolidated or merged if such corporation has an equal or better ability to meet all of Swaptor's obligations under this Agreement and expressly assumes the obligations set forth in this Agreement or (b) a subsidiary.

20.8 *Successors and Assigns*. This Agreement will be binding on and inure to the benefit of the parties and their respective successors and permitted assigns.

20.9 *Notices*. All notices, requests, demands and other communications required or permitted hereunder will be in writing and will be sent by international registered mail,

with return receipt requested and postage prepaid, or delivered by an internationally recognized air delivery service, as follows:

To Swaptor:	Swaptor, Ltd. PO Box 642 Charlestown, Nevis, West Indies Attn: Eugene Herbert, CEO
To FastTrack:	FastTrack PO Box 3509 S-103 69 Stockholm, Sweden Attn: Niklas Zennström, CEO

or to such other address as the party to whom notice is to be given may have previously furnished to the other party in writing in the manner set forth above.

20.10 *Relationship of the Parties*. The relationship of FastTrack and Swaptor established by this Agreement is that of independent contractor, and nothing contained in this Agreement will be construed to constitute the parties as participants in a joint or common undertaking, or allow Swaptor to create or assume any obligation on behalf of FastTrack for any purpose whatsoever.

Swaptor, Ltd.	Consumer Empowerment B.V.
By: */s/* Eugene Herbert Chief Executive Officer Date: May 31, 2001	By: Niklas Zennström Chief Executive Officer Date: May 31, 2001

Exhibit 1

DESCRIPTION OF SOFTWARE FUNCTIONALITY

KaZaA Media Desktop

KaZaA Media Desktop ("KMD") is a full featured peer-to-peer file sharing application. You can search, download, organize and play your media files - audio, video, images and documents - with it. It has a powerful search engine where you can search on 'meta data' such as categories, artist etc. Search results are grouped together, so the same file will only be displayed once. The application has intelligent download - files will be downloaded from several sources simultaneously, thus speeding up the download, and they will be resumed if broken.

The My KaZaA is an integrated organizer of your media files - they will automatically be grouped according to media type, category and artist/album. The "Theatre" is the integrated media player, where you can play music and videos and look at images.

With KMD you will also share your media files with the community - making the community bigger and better

Distributed Self-Organizing Network

KaZaA's network is a distributed, self-organizing network. Neither search requests nor actual downloads pass through any central server. The network is multi-layered, so that more powerful computers got to be search hubs ("SuperNodes"). Any KaZaA client may become a SuperNode, if it meets the criteria of processing power, bandwidth and latency. Network management is 100% automatic - SuperNodes appear and disappear according to demand.

Intelligent Downloads

KaZaA uses an Intelligent Downloads system to greatly improve download speed and reliability. The goal of Intelligent Downloads is to free the user from the tedious activities like retrying downloads and downloading from several sources to find the fastest. Intelligent Downloads automatically finds the fastest source to download a file from. In addition, files are being downloaded simultaneously from several sources, if it is calculated that this will improve the download speed. Files are divided into several chunks, each chunk being downloaded from a separate source. For example, a user on a fast cable modem can quite comfortably download simultaneously from 5 modem users, achieving a total download speed 5 times higher than a single modem. This is also advantageous for most broadband connections, since they are often asymmetrical.

Downloads are very persistent, if a download fails from one source, the next source is tried. If all sources are exhausted, a new network search is performed, in order to find more sources. If none is found, the Intelligent Downloads system waits for some time, and then tries again. Continuing like this on the worst case, a particular download stays active for about 24 hours, retrying every now and then, before finally giving up. This all ensures very high download success rates.

Automatic Meta Data Assignment (AMDA)

When files are imported to KaZaA, a variety of Meta Data - information about the content of the file - is automatically extracted. The Meta Data being detected depends on the file type - for MP3 files, it comprises Title, Album, Artist, Length, and bit rate; for Video files it comprises Resolution, Color Depth and Codec; and for Word documents it comprises Author, Title and Version. As all of this Meta data is searchable, it greatly increases the search

possibilities and accuracy. And KaZaA uses all the Meta Data to automatically arrange imported files in a personalized media library.

KaZaAServer

The KaZaAServer handles tasks such as new user registrations, auto-updates and network-related activities, such as connecting to the network.

The server requires a Linux computer.

SuperNode Seed Server

The SuperNode Seed Server maintains a list of IP numbers to active SuperNode that the KaZaA clients (KMD) may connect to. It may reside on the same physical server as KaZaAServer.

Exhibit 2

EXAMPLES OF PLANNED NEW FEATURES FOR SOFTWARE

- Ignore list and adult filter (blocks adult content and allows the user to block specific search results from specific users)
- Mail this to a friend (allows users to mail a link to file on the network to a friend)
- Number of concurrent uploads limitations
- Peer-to-peer install program (reduces the size of the installation program)

This feature list is tentative and subject to change.

FastTrack is also planning a few new services, which will improve the product. Swaptor will be able to license and use such new products and services separately on terms mutually agreed to by both parties.

Exhibit 3

REQUIRED TERMS FOR END USER SUBLICENSE AGREEMENTS

Each sublicense by Swaptor of the Software to an end-user must contain terms that are legally sufficient to:

1. Prohibit end-users from further copying and/or transfer and/or sublicensing of Software code and documentation; and

2. Prohibit reverse assembly, reverse compilation or other translation of the Software; and

3. Include the following statements or other legally sufficient and wholly comparable terms:

> "software provided under this Agreement is copyrighted and licensed (not sold), and includes KaZaA software under license © 2000-2001 FastTrack B.V. Swaptor does not transfer title to the Software"; and

4. Include the following statements or other legally sufficient and wholly comparable terms:

> "Software provided under this Agreement may contain or be derived from portions of code and documentation provided by third parties under license to Swaptor. Swaptor has assumed responsibility for the selection of such code and documentation and its use in producing and licensing the Software. THE THIRD PARTIES DISCLAIM ALL WARRANTIES WITH RESPECT TO THE USE OF SUCH COD OR DOCUMENTATION IN THE SOFTWARE, INCLUDING (WITHOUT LIMITATION)

> ANY WARRANTIES OR MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE."; and

5. Include the following statements or other legally sufficient and wholly comparable terms at the end of Swaptor's limitation of liability section:

> "The limitation of liabilities described in this section also applies to any third-party supplier of code and documentation supplied. Swaptor and its third-party supplier limitation of liabilities is not cumulative. Such third-party suppliers are intended beneficiaries of this section."

Exhibit 4

TENTATIVE TIME PLAN

May 31, 2001	Execution of Software License Agreement
May 31, 2001	Swaptor delivers list of required KMD changes, namely custom text and graphics
June 1, 2001	FastTrack delivers KaZaAServer software elements and KaZaALib
June 7, 2001	FastTrack delivers customized version of KaZaA Media Desktop
June 7, 2001	Completed installation of KaZaAServer and SuperNode Seed server
June 12, 2001	Testing completed
June 12, 2001	Ready for launch

Exhibit 5

WARRANTY SERVICES

1. *Services*

1.1 *Basic Services.* FastTrack will maintain and support the Software during the Term by providing to Swaptor, at no additional cost to Swaptor, modifications and corrections to the Software that do not provide significantly different functionality ("Revisions"). If required as a result of the Revisions, FastTrack also will ship to Swaptor, at no charge to Swaptor, a single master copy of FastTrack documentation that relates to the Revision object code which Swaptor may use for preparing and publishing External Documentation for its customers.

1.2 *Enhancements.* FastTrack will notify Swaptor of the existence of and, if requested, provide Swaptor with any enhancements, improvements or other changes to the Software that may provide different functionality.

2. *Errors Not Due to FastTrack and Technical Support.* FastTrack reserves the right to charge Swaptor for labor time at the FastTrack hourly labor rates in effect at the time such services is rendered in the event that FastTrack is requested by Swaptor to provide (a) remedial service on the Software and it is later determined that the apparent problem in the Software was due to hardware or software not supplied by FastTrack or (b) technical support Swaptor.

3. *Response times.* FastTrack will use its best reasonable efforts to:

(a) Within forty-eight (48) hours, verify technical questions and reports of errors concerning the Software or the External Documentation, if technically possible to do so.

(b) Within seventy-two (72) hours, provide answers to verified technical questions and Revisions or work-around solutions for verified errors, concerning the Software or the External Documentation, if technically possible to do so.

Jeff Hardison

From: Michael Weiss [mike@streamcast.ws]
Sent: Friday, March 15, 2001 9:19 AM
To: Jeff Hardison
Subject: FW: The email

Let's discuss

----Original Message----
From: Brian McWilliams
[mailto:bmncilliams@internet.com]
Sent: Friday, March 16, 2001 9:15 AM
TO: mweiss@musiccity.com
Subject: The email

Mike.

Nice talking to you. Hope we can chat again very soon. Can you confirm the note below is authentic?

Thanks.
Brian

Michael Weiss mweiss@musiccity.com wrote:
From: "Michael Weiss" mweiss@musiccity.com
To: Decx47720@yahoo.com
onn22@home.com
Subject: MusicCity
Date: Mon. 5 Feb. 2001 22:25:40 -0800

Hi Laura & Brenda:

My name is Mike. I am the "ringleader" of MusicCity. Your messages were forwarded to me from Derek, our NetOps guy. I was distressed to read the postings about

Laura from Matt. I don't recall being that immature when I was in my teens. This does not represent the type of community we hope to help build within the Alternative Napster universe. I think Matt needs to be handled delicately (at first). I will do so...but will take whatever steps will be necessary to bring harmony with us and all networks out there. Matt was one of the first users to the Network and spent a lot of time at MusicCity (now I know why since he has been banned elsewhere). We started growing so quickly that we needed some mods immediately and he was the first volunteer. He has been helpful in some regards--but his actions are diametrically opposite of what we want to be known for.

I know that a lot of people are wondering "Who is MusicCity.com." I know you are, too. Here's a little background.

We have a small group at MusicCity. Most of us have worked together before in both the internet and CD-ROM biz. We are located in CA, AZ and TN and range in age from 23 to 48. I'm the "old guy" but I don't feel like it. I was the founder of WebRadio.com, but split from then when I had a dispute with the Parent company (located in the MidEast). Back in the early 70's I was a promo man for Columbia Records out of Miami (the fun days of the music biz) then moved back to my hometown Chicago. I was a club DJ in the mid 70's and had a big following because I knew how to mix...kept the dance floor jammed. Still have my vinyl!

In 1978, I opened the 3rd video store in the world (missed being #1 by a month). Everyone said I was nuts and that video was just a fad. Proved them wrong! Then the MPAA (Motion Picture Assoc of America) and the big movie studios decided that people should not be allowed to rent videos for a few dollars—only buy them for big bucks.

They did everything they could to stop rentals and make life miserable for all the independent video retailers around the country—they began lobbying Congress to change the law (similar to now the Music Industry got the Digital Millennium Copyright Act passed--but they had no opposition at the time that the studios had from the retailers.

At that time, all the independent video retailers (this was years before Blockbuster) were competitive with each other but I was able to rally them all together at the '81 CES show in Vegas, when a small group of us created the "Video Retailers Association of America" to fight the MPAA and the studios. Everyone said I was nuts and that the MPAA would crush us. Proved them wrong! All of the retailers got together, we got our customers together, we targeted the congressman, we even testified in Congressional hearings...and WE WON! That's why you can go to a video store and rent a video or DVD today. If the movie studios had their way they would have killed the video industry before it ever had a chance to take off...like the record labels are trying to do with music on the net today.

I sold my stores in the early 80's, moved out West and eventually became head of the American Video Association—fighting for the rights of independent video store owners against the national chains (Blockbuster) and mass merchants (WalMart). I left the home vid industry in 94 and went digital—first in CD-ROM's (the company I was with created "multipacks" 10 CD-ROMs for the price of one) and then the internet. I got my first cable modem connection in early '97 and got hooked on the net! (Our head tech guy has been on the net since the 80's).

I joined MusicCity in April to launch a free personalized on-line radio service. Starting negotiating deals with the major Record labels, but realized that it was like talking to a brick wall. The terms they wanted were oppressive...the

only ones that could survive on the deals they wanted were them! It was a No-WIN!!!! Then seeing how Napster Inc. has sold out just [illegible] even more pissed.

Now, Orr[illegible]ch, head of the Judiciary Committee in the US Congress says he wants to stop the Big 5 Music Labels from being the gatekeepers of music on the net and might begin holding Congressional hearings in a few months. This is Deja Vu, the same that happened with the video industry all over again…just the RIAA and the Music Labels instead of the MPAA and the Movie Studios (although some of them are the same-like TimeWarner…er AOL Time Warner).

So here's the deal. Initially, we launched our Alternative Napster Network so there could be a solid network that could handle the load of disenfranchised Napster users. We didn't do it to compete with any of the other Alternative Networks, just to add our capacity to the fight. We are also creating a neat piece of software that will do much better things than Napster. And just like I did back in the video industry, I hope that we can get all the Alternative Networks to collaborate with one another and to leverage the power of our collective user base to shape the future of music over the net…worldwide. Together, we have a real "once in a lifetime" opportunity to change the course of history. Changing history is a good thing.

At MusicCity, we were all surprised to see our traffic skyrocket within just a couple of weeks. Tells me that we are on the right track to becoming a real alternative to Napster Inc. We've added more servers and are happy to see that others have also done so. I think collectively we are in a position give Napster a real run. I understand from others that the Napster people have grown really arrogant. Karma will get them in the end. If there is going to be a real alternative to Napster, it can't be just one company, like

MusicCity. This is a time that all the Alternatives need to pull together-no mater what size. This is our opportunity—all of ours!

DO you think we can get everyone to work together and form some kind of coalition?

Mike

PS: There has been a lot of speculation on who we are--ranging from us secretly being owned by AOL, the Adult Sex Industry and the RIAA. Its kind of amusing to have this little bit of mystery going--so please be discrete on who you share our story with.

Brian S. McWilliams
InternetNews.com
bmcwilliams@internet.com
Phone: (603) 742-9401
Mobile: (603) 591-4306
eFax: (413) 480-1293
PGP Key ID OxB91BA748
____/www.internetnews.com

Than Clevenger

From: Jones Allen
Sent: Wednesday, April 11, 2001 10:39 AM
To: Jeff Hardison: Than Clevenger
Subject: RE:****READ THIS***FW: * RE: MusicCity.com--Internet Issues

I disagree with Andrew's assessment that the "old network" needs to be switched *now.*

Patel ordered Napster to police the artist and song names rather than file name, but Napster doesn't necessarily have the technology to search that meta-data information. MusicCity's defense in the next three days could be that it has that technology but is not quite ready to roll it out. MusicCity can say "we'll have that technology ready to go within the next week, and when it's bulletproof we promise to implement it," thus buying themselves time to switch to the new network. When that technology rolls out with the new network, they've thus killed two birds with one stone: decentralized the directories and allowed for song and artist-name searches, which is what Patel and the RIAA want.

Moving forward, the key will be to create a strategy (both business and PR) that bulletproofs MusicCity and Morpheus/StreamCast from future litigation. I believe, and I'm just tossing this out there, that our best bet is to position Morpheus as a forward-thinking application for non-music industries, an application that can redefine legal distribution methods for digital-media companies (software, video, music, etc). If we can get corporations such as Adobe, Corbis, AutoDesk et al to see this as a way to avoid facing the problems the RIAA is facing today, then we've got both a solution for businesses and a solution for MP3-happy college students. Sure, pirating will be there, but it'll be minimal and not the primary function of the software.

Nutshell: Morpheus is a new distribution channel that can reduce production and distribution costs to digital-media companies. Morpheus is a new, efficient way to search for audio, video and other digital files. Morpheus is an application that can provide businesses easy access to the software they need, with legal licensing rights easily purchased from the owners (ideal for businesses, not consumers, due to the high-bandwidth necessary to download huge software files).

Sorry for the long email, but that's how I envision Morpheus moving forward. What are your thoughts?

Jonas

------Original Message-----
From: Jeff Hardison
Sent: Wednesday, April 11, 2001 9:55 AM
To: Than Clevenger; Jonas Allen
Subject *****READ THIS****FW: RE: MusicCity.com -- Internet Issues
Importance: High

fyi
-----Original Message-----
From: Steve Griffin
Sent: Wednesday, April 11, 2001 7:21 AM
To: 'jeff_hardinson@kvo.co

Subject: Fw: RE: MusicCity.com - - Internet Issues
Importance: High

Jeff and Than

Thanks again for a great day. I left energized by our exchange. I have forwarded a message from Andrew. It makes sense only when you go to wired.com and read a summary of the court coverage

Based on the current attitude of the judge, we all feel in our gut we need to launch asap. They key will be how quickly wwe can mobilize the chat "attack" strategy. Keep in mind good friday and easter weekend.

I land back in nashville via dallas and will check email in dallas. Otherwise in nashville @ 2 30 pst

Steve

_ _
Sent from my BlackBerry Wireless Handheld.

- - - - -Original Message- - - - -
From: ABridges@wsgr.com <ABridges@wsgr.com>
To: mike@streamcast.ws <mike@streamcast.ws;>
sgriffin@musiccity.com <sgriffin@musiccity.com>
CC: CCastle@wsgr.com <CCastle@wsgr.com> TChen@wsgr.com
Sent: Tue Apr 10 20:34:24 2001
Subject: RE: MusicCity.com - - Internet Issues

Based on news reports from Napster hearing - - Terri couldn't get in because there were so many plaintiffs that even a lot of press couldn't get in, and the judge wouldn't move to a larger courtroom or allow a closed-circuit feed - - I think there has been a dramatic shift in the winds. I recommend taking the current service down *now*. In my

view, the service, which has always been risky, is now unbelievably risky.

Link: http://news.cnet.com/news/0-1005-200-5567384.html?>tag=tp_pr

What is on CNET is consistent with what I heard on the radio.

Notably she imposed a policing requirement based solely on artist and title information -- essentially the same information that the RIAA sent to me on CD -- without requiring file information.

I will send you the CD tomorrow for you to look at and to see how you can deal with it. As you know, I had simply pushed back at the RIAA saying it was of no use because we needed file data. Patel's comments rob that argument of a lot of power right now.

Maybe Patel's not correctly reading the Ninth Circuit. Maybe the rules that apply to a company that allegedly didn't abide by the rules at the outset are different from the rules that apply to a different company. Maybe Ninth Circuit will modify its decision, or even reverse it. But if I were the RIAA I'd be cocky as hell and start firing bazookas in your direction.

We can talk further tomorrow.

Andrew Bridges
Wilson Sonsini Goodrich & Rosati
Tel +1 650 320 4861
Cell +1 650 867 7778

Than Clevenger

From: **Sharon VanSickle**
Sent: **Wednesday, April 11, 2001 8:52AM**
To: **Jeff Hardison: Than Clevenger, Jones Allen**
Subject: **Napster fyi**

Napster Acquires Gigabeat's Technology and Engineers REDWOOD CITY, Calif. (VENTURENIRE) -- Napster, the embattled operator of an online music file sharing service, said it has acquired the technology and engineering team of digital media technology firm Gigabeat. Financial terms of the asset acquisition were not disclosed. Napster said it would use the music search and song file identification technologies developed by Gigabeat in its ongoing court-ordered compliance and development efforts. At a hearing yesterday in U.S. District Court in San Francisco, Judge Marilyn Patel was critical of Napster's efforts so far to remove copyrighted songs from its system, according to several reports. In addition to the engineering team, Gigabeat's co-founders, Wilburt Labio and Narayanan Shivakumar, have joined Napster. Gigabeat was backed by Kleiner Perkins Caufield & Byers and individuals including Andy Bechtolsheim, Sabeer Bhatia, Audrey MacLean, Rejeev Motwani, and Ra Shiriran. The company, which launched last June, raised $6.5 million in first round funding.
http://www.gigabeat.com
http://www.napster.com

Sharon VanSickle
President/CEO
KVO Public Relations,
A Fleishman Millard Company
__00 SW Market Street, Suite 1400
Portland, OR 97201
503/221-1551

MusicCity.com a subsidiary of StreamCast

MusicCity

"Napster, it isn't the only file-sharing service. But others, such as Gnutella, practically require an engineering degree to use. **Much more user-friendly is MusicCity**.com

-MSNBC Feb 14, 2001

"Frustrated Napster fans can **turn to MusicCity**.com,"

-CNN Feb 13, 2001

"**Thousands of users** are logging on to MusicCity"

-ZD Net Feb 12, 2001

"**MusicCity.com is the largest** provider of OpenNap servers"

-PC World Feb 6, 2001

MusicCity

- The #1 Alternative Network to Napster in 30 days

  -Growing at a rate of adoption exceeding Napster

- More searches per minute than Google

  -Key-word searches monetized similarly

- More user hours per month than Excite@Home

-Morpheus technology uniquely monetizes network traffic

- Potential to become leading channel for C.E. products

Dominating the Napster Alternatives

MusicCity Revenue Strategy

- Will deploy 75 year old profitable radio broadcast model while keeping music free to users
- Revenue from advertisers, sponsors and mktg fees
  - Rich media ads appearing within Morpheus interface
  - Audio ads inserted 2 minutes per hour
  - Gateway Sponsorships
  - Date mining services to record labels
- Revenues from PeerSearch
  - premium positioning of search results; keyword tie-ins
- Subscription service wholesaled to ISPs
  - $9.95 premium service
  - added to subscrioers' monthly ISP bill

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed Oct. 21, 2002]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

Second Declaration of George M. Borkowski in Support of Plaintiffs' Motion for Summary Judgment on Liability

* * * *

32. Attached hereto as Exhibit 31 is a true copy of Grokster's home page, and the meta-data associated therewith, which includes a meta-tag for Napster.

* * * *

www.grokster[1]

```
<html><!-- #BeginTemplate "/Templates/index.dwt" -->
<head>
<!-- #BeginEditable "doctitle" -->
<title>Grokster for p2p or person to person file sharing</title>
<meta name=description content="Grokster - Media community, lets you find music, mov
ies, pictures, graphics, programs and documents, and download these directly to your
 computer.">
<meta name=keywords content="file-sharing, peer-to-peer, MP3, Gnutella, Napster, Win
amp, music, download, search, mpg, media, video, film, Grokster, pic, artist, top, c
lip, TV, image, find, musik, CD, Free file sharing, download, MPEG search, Windows o
ptimized, MP3, WAV, MPG, MPEG, MOV, AVI, ASF, JPG, GIF, HTM, HTML, TXT, network">
<!-- #EndEditable -->
<meta http-equiv="Content-Type" content="text/html; charset=iso-8859-1">
<meta name=description content="Grokster - Media community, lets you find music, mov
ies, pictures, graphics, programs and documents, and download these directly to your
 computer.">
<meta name=keywords content="grokster, grockster, file-sharing, peer-to-peer, MP3, G
nutella, Napster, Winamp, music, download, search, mpg, media, video, film, Grokster
, pic, artist, top, clip, TV, image, find, musik, CD, Free file sharing, download, M
PEG search, Windows optimized, MP3, WAV, MPG, MPEG, MOV, AVI, ASF, JPG, GIF, HTM, HT
ML, TXT, network">
<link rel="stylesheet" href="style" type="text/css">
</head>

<body bgcolor="#FFFFFF" text="#000000">
<table width="650" border="0" cellspacing="0" cellpadding="0" bgcolor="#FFFFFF" alig
n="center">
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<td>
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lass="menu"><b><br>
<a target="_top" href="http://download.com.com/3000-2166-10061303.html?part=grokster
&subj=dlpage&tag=button">Download</a><br>
<a href="tellafriend.html">Tell A Friend</a><br>
<a href="newsletter.html">Free Newsletter</a><br>
<a href="http://www.grokster.com/cgi-bin/dcforum/dcboard.cgi">Support Forum</a><br>
<a href="contentproviders.html">Artist Services</a><br>
<a href="pastartists.html">Past Artists</a><br>
<a href="helpfaq.html">Help / FAQ</a><br>
<a href="aboutus.html">About Us</a><br>
```


www.grokster[1]

```
<a href="policies.html">Policies</a><br>
<a href="privacy.html">Privacy Policy</a><br>
<a href="technology.html">Technology</a><br>
<a href="linktous.html">Link To Us</a><br>
<a href="contactus.html">Contact Us</a><br>
<a href="press.html">Press</a><br>
<a href="/affiliates/info.html">Affiliates</a><br>
<a href="links.html">Links</a><br>
<a href="advertise.html">Advertise</a></b></span></p>
<p align="center"></p>
</td>
</tr>
</table>
<p align="center"><a href="http://partners.starnetsystems.net/qb/ClickServlet?pid=41
3057&cid=18510" target="_blank"><img src="http://www.mayancasino.com/graphics/banner
s/mayan_125.gif" width="123" height="123" bor er=1></a><br>
<img src="images/greydot.gif" width="1" height="1"> <!-- #BeginEditable "d" -->
<SCRIPT LANGUAGE="JavaScript" TYPE="text/javascript" SRC="http://www3.jiveplayer.com
/JScripts/groksterK3875nv3nCr26rcj.js"></SCRIPT>
      <p align=center><a href="http://www.fasttrack.nu" target="_blank"><img src="/i
mages/ft.gif" width="100" height="40" border="0"></a>
      <!-- #EndEditable --></p>
</td>
<td width="505" valign="top" height="544">
<div align="center">

<script language="Javascript"><!--
var i=j=p=t=u=x=z=dc='';var id=f=0;var f=Math.floor(Math.random()*7777);
id=2215; dc=document;u='ht'+'tp://media.fastclick.net/w'; x='/get.media?t=n';
z=' width=468 height=60 border=0 ';t=z+'marginheight=0 marginwidth=';
i=u+x+'&sid='+id+'&m=1&f=a&v=1.4&c='+f+'&r='+escape(dc.referrer);
u='<a  hr'+'ef="'+u+'/click.here?sid='+id+'&m=1&c='+f+'"  target="_blank">';
dc.writeln('<ifr'+'ame src="'+i+'&d=f"'+t+'0 hspace=0 vspace=0 frameborder=0 scrolli
ng=no>');
if(navigator.appName.indexOf('Mic')<=0){dc.writeln(u+'<img src="'+i+'&d=n"'+z+'></a>
');}
dc.writeln('</iframe>'); // --></script><noscript>
<a href="http://media.fastclick.net/w/click.here?sid=2215&m=1&c=1"  target="_blank">
<img src="http://media.fastclick.net/w/get.media?sid=2215&m=1&d=s&c=1&f=a&v=1.2"
width=468 height=60 border=1></a></noscript>

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<tr>
<td bgcolor="#CCCCCC">
```

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<div align="center" class="header"><img src="images/greydot.gif" width="1" height="1
"><br>
<!-- #BeginEditable "title" -->Welcome to Grokster!<!-- #EndEditable --><br>
<img src="images/greydot.gif" width="1" height="1"></div>
</td>
</tr>
</table>
<br>
<table width="495" border="0" cellspacing="0" cellpadding="0">
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<!--
<table border=0 width="100%" cellspacing=3 cellpadding=1><tr><td bgcolor="#000000">
<table border=0 width="100%" cellpadding=0 cellspacing=3 bgcolor="#FFFFFF"><tr><td a
lign=center>
Important Information
</td></tr></table></td></tr></table>
-->
<table border=0 width=160 align=right cellspacing=5 cellpadding=1><tr><td>

<a target="_top" href="http://download.com.com/3000-2166-10061303.html?part=grokster
&subj=dlpage&tag=button"><img src="/images/dl-btn.gif" width=148 height=59 border=0>
</a><br>

</td></tr><tr><td bgcolor="#000000">

<table border=0 cellpadding=0 cellspacing=3 bgcolor="#EEEEEE" width=148>
<tr>
<td align=center><b><a href="brilliantdigital.html">NO Brilliant Digital software in
 Grokster!<br><small>Details here!</small></a></b></td>
</tr></table>

</td></tr><tr><td bgcolor="#000000">

<table border=0 cellpadding=0 cellspacing=3 bgcolor="#EEEEEE" width=148>
<tr>
<td align=center> <a href="dlderinformation.html"><b>DlDer Information</b></a> </td>
</tr></table>

</td></tr><tr><td bgcolor="#000000">

<table border=0 cellpadding=0 cellspacing=3 bgcolor="#EEEEEE">
<tr>
 <td align=center><a href="/morpheusmigration.html"><b>Using Morpheus?</b></a> </td>
```



```
</tr><tr><td height=4></td></tr><tr>
<td align=center>Move your Morpheus v1.3 settings and
partially completed files to Grokster automatically!<br>
<a href="/morpheusmigration.html"><b>Click Here!</b></a>
</td>
</tr>
</table>

</td></tr><tr><td bgcolor="#000000">

<table border=0 cellpadding=0 cellspacing=3 bgcolor="#EEEEEE">
<tr><td align=center><a href="press.html"><b>Grokster Partners With ReelMind!</b></a
></td></tr>
<tr><td height=1 bgcolor="#999999"></td></tr>
<tr><td align=center><a href="press.html"><b>Grokster Strikes a Deal With GigAmerica
</b></a></td></tr>
</table>
</td></tr></table>

<center>
<b>
<font color=red>&#149;&gt;</font>
<font color=orange>&#149;&gt;</font>
<font color=yellow>&#149;&gt;</font>
</b>
<A href="basics.html">View The Basics to Using Grokster</a>
<b>
<font color=yellow>&lt;&#149;</font>
<font color=orange>&lt;&#149;</font>
<font color=red>&lt;&#149;</font>
</b>
</center>

          <p align="center"><font size="+1"><a target="_top" href="http://downlo
ad.com.com/3000-2166-10061303.html?part=grokster&subj=dlpage&tag=button"><b>Next Gen
eration File Sharing</b></a></font></p>
          <p>Grokster is the latest generation of file sharing software. The Gro
kster generation of file sharing presents these exciting features:</p>
          <ul>
            <li><b>Free</b>: Grokster is 100% free to
              use.<br>
              <br>
            <li><b>Peer-to-Peer</b>: True person to person file searches and
              transfers.<br>
```

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  <br>
</li>
<li><b>Fast Searches</b>: Unlike Gnutella type programs, Grokster's
  SuperNode technology provides for very fast searches.<br>
  <br>
</li>
<li><b>Detailed Searches</b>: The Grokster technology tracks detaile

  file info and allows detailed searches on it.<br>
  <br>
</li>
<li><b>No Incomplete/Failed Downloads</b>: Grokster automatically
  removes incomplete downloads.<br>
  <br>
</li>
<li><b>Auto Resume</b>: Grokster will automatically seek out the
  same file from multiple sources and continue downloading until
  complete.<br>
  <br>
</li>
<li><b>Fastest Downloads</b>: Grokster will download the file
  from multiple sources with the fastest connections as fast as
  you can download, automatically.<br>
  <br>
</li>
<li><b>File Preview</b>: Preview files as you start downloading
  them.<br>
  <br>
</li>
                <li><b>All File Types</b>: Share any type of file.</li>
              </ul>
              <p align="center"><b><a target="_top" href="http://download.com.com/30
00-2166-10061303.html?part=grokster&subj=dlpage&tag=button">Click here now to Downlo
ad!</a></b></p>
              <!-- #EndEditable --></td>
</tr>
</table>

</div>
</td>
</tr>
</table>
<p align="center"><img src="images/greydot.gif" width="650" height="1"></p>
<p align="center">Copyright 2001.2002 Grokster, LTD.</p>
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<p>  </p>
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<!-- #EndTemplate --></html>
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I. LEGAL NOTICE AND TERMS OF SERVICE

Use of the Morpheus client software and the MusicCity Network Service is provided by MusicCity Networks, subject to the notices, terms, and conditions set forth below and on the Morpheus client MusicCity.com web site, including, but not limited to those in the MusicCity Network License Agreement, the Terms of Service (as set forth below), and the MusicCity Networks Repeat Copyright Offender Policy (as set forth below). We may regularly amend those notices, terms and conditions at any time without prior notice by posting new or revised terms of use policies and other documents on the Morpheus software or MusicCity.com web sites. It is important for you to check this and other terms and conditions related to use of Morpheus and other MusicCity Networks products and services from time to time. PLEASE READ THESE TERMS CAREFULLY BEFORE USING MORPHEUS OR THE MUSICCITY.COM WEB SITE. USE OF MUSICCITY NETWORKS PRODUCTS AND SERVICES CONSTITUTES YOUR ACCEPTANCE OF ALL SUCH NOTICES, TERMS AND CONDITIONS.

1. Violation of Copyright and Other Laws When Using MusicCity Networks

PLEASE NOTE THAT MUSICCITY RESPECTS THE RIGHT OF COPYRIGHT OWNERS AND IS FULLY COMMITTED TO PROTECT THEIR RIGHTS. MUSICCITY NETWORKS EXPECTS ALL MUSICCITY NETWORKS USERS AND MUSICCITY NETWORKS WEB SITE USERS TO DO THE SAME. WE, THEREFORE, ASK YOU TO PAY SPECIAL ATTENTION TO AVOID VIOLATING COPYRIGHT LAWS AND REGULATIONS. AS A CONDITION TO USE THE MUSICCITY NETWORKS PRODUCTS AND SERVICES, YOU MUST AGREE THAT YOU WILL

NOT USE MUSICCITY NETWORKS TO INFRINGE THE INTELLECTUAL PROPERTY OR OTHER RIGHTS OF OTHERS IN ANY WAY. UNAUTHORISED COPYING, DISTRIBUTION, MODIFICATION, PUBLIC DISPLAY, OR PUBLIC PERFORMANCE OF COPYRIGHTED WORKS IS AN INFRINGEMENT OF THE COPYRIGHT HOLDERS' RIGHTS.

YOU SHOULD NOT USE THE MUSICCITY NETWORKS SERVICE TO OBTAIN ANY PERSONAL INFORMATION ABOUT ANY MUSICCITY NETWORKS USERS TO MODIFY, DELETE OR DAMAGE ANY INFORMATION CONTAINED ON THE PC OF ANY USER CONNECTED TO THE MUSICCITY NETWORKS SERVICE. YOU ARE HEREBY PUT ON NOTICE THAT YOU ARE ENTIRELY RESPONSIBLE FOR YOUR CONTENT AND FOR ENSURING THAT IT COMPORTS WITH ALL APPLICABLE LAWS INCLUDING ALL COPYRIGHT AND DATA-PROTECTION LAWS IN CASE YOU FAIL TO COMPLY WITH LAWS REGARDING COPYRIGHTS OR OTHER INTELLECTUAL PROPERTY RIGHTS AND DATA-PROTECTION. YOU MAY, BY THE APPROPRIATE, LEGAL AUTHORITIES, BE SUBJECT TO CIVIL AND CRIMINAL LIABILITY INCLUDING FINES AND INCARCERATION.

2. Terms of Service

If you are an adult, to use MusicCity Networks, you must first: (a) register via our web site, (b) read and accept the MusicCity Networks/Morpheus Client License Agreement of which this Notice and Terms of Service are part, (c) agree to be bound by the terms of that License by pressing the 'Yes' button on the Morpheus download screen and (d) pay the applicable fees

If you are a minor you will become eligible to use MusicCity Networks upon your parent: (a) registering for MusicCity Network via our web site, (b) reading and accepting the MusicCity Networks/Morpheus License Agreement of which this Notice and Terms of Service are part, (c) agreeing to be bound by the terms of that license by pressing the 'Yes' button on the Morpheus download screen and (d) paying the applicable fees. You understand and agree that MusicCity Networks is provided "AS-IS" and that we assume no responsibility for the failure or inaccuracy of MusicCity Networks. You are responsible for paying all applicable taxes and fees for all hardware, software, service and other costs you may incur in connection with your use of MusicCity Networks and providing all equipment and software necessary to connect to our web site and to use MusicCity Networks via the Internet. We may add, delete or change some or all of our services provided in connection MusicCity Networks at any time. Any new features that augment or enhance MusicCity Networks will be subject to these notices, terms and conditions and will also be subject to all other applicable MusicCity Networks policies, terms, notices and conditions as discussed above. We may establish general practices and limits concerning use of MusicCity Networks. For example, we may limit the number of files that you may make accessible to other MusicCity Networks

users or the number of files of other MusicCity Networks users that you may access. You agree to accept these general practices and limits as they may be in effect from time to time. In addition, we reserve the right at any time and from time to time to modify or discontinue, temporarily or permanently, MusicCity Networks (or any portion thereof) for any reason or no reason, with or without notice. You agree that we will not be liable to you or to any third party for any modification, suspension or discontinuance of MusicCity Networks.

3. Agreement to Provide True, Correct and Accurate Information for Your Use of MusicCity Networks.

In consideration of your use of MusicCity Networks, you agree that the information you provide to us is and will be true, correct and accurate in all respects, and you agree to update such information as necessary to keep it true, correct and accurate in all respects. If you provide any information that is not true, correct and accurate in all respects, or we have reasonable grounds to suspect that such information is not true, correct and accurate in all respect, you will no longer have the right to use MusicCity Networks. You will be asked to establish a user name and password when registering as a MusicCity Networks user. You are responsible for maintaining the confidentiality of your password and are fully responsible for all activities that occur under your account. You agree (i) that you will not provide your password to any third party, and you will not allow any third party to access your account, (ii) to immediately notify us of any unauthorized use of your account or any other breach of security and (iii) that you will establish and maintain only one MusicCity Networks registration at a time.

4. Registration Obligations for Your Use of MusicCity Networks.

MUSICCITY NETWORKS DOES NOT CONTROL OR HAVE KNOWLEDGE OF ANY OF THE AVAILABLE CONTENT SHARED USING MUSICCITY NETWORKS OR THE MORPHEUS CLIENT SOFTWARE. ALL CONTENT, SUCH AS MUSIC, AUDIO, VIDEO, PHOTOGRAPHS, TEXT, MESSAGES, OR OTHER MEDIA MAERIALS, WHETHER PUBLICLY POSTED OR PRIVATELY TRANSMITTED, ARE THE ENTIRE RESPONSIBILITY OF THE PERSON FROM WHICH SUCH CONTENT ORIGINATED.

MusicCity Networks does not guarantee the accuracy, integrity, quality or legality of such content. You may be exposed to content that is offensive, indecent or objectionable. Under any circumstances, MusicCity Networks will not be liable in any way for any errors or omissions in any content, or for any loss or damage of any kind incurred as a result of any content transmitted via the Service.

You agree to not use the Service to:

Transmit any content that is unlawful, harmful, threatening, abusive, harassing, defamatory, vulgar, obscene, invasive of another's privacy, hateful, or racially, ethnically or otherwise objectionable;

Harm minors in any way;

Impersonate any person or entity or falsely state or otherwise misrepresent your affiliation with a person or entity;

Forge headers or otherwise manipulate identifiers in order to disguise the origin of any content transmitted through the Service;

Transmit any content that you do not have a right to transmit under any law or under contractual or fiduciary

relationships (such as inside information, proprietary and confidential information learned or disclosed as part of employment relationships or under nondisclosure agreements)

Transmit any content that infringes any patent, trademark, trade secret, copyright or other proprietary rights ("Rights") of any party;

Transmit any material that contains software viruses or any other computer code, files or programs designed to interrupt, destroy or limit the functionality of any computer software or hardware or telecommunications equipment;

Disrupt the normal flow of dialogue, cause a screen to "scroll" faster than other users of the Service are able to type, or otherwise act in a manner that negatively affects other users' ability to engage in real time exchanges;

Interfere with or disrupt the Service or servers or networks connected to the Service, or disobey any requirements, procedures, policies or regulations of networks connected to the Service;

Intentionally or unintentionally violate any applicable local, state, national or international law, including securities exchange and any regulations having the force of law;

"Stalk" or otherwise harass another; or

Collect or store personal data about other users. You acknowledge and agree that MusicCity Networks may preserve content and may also disclose content if required to do so by law or in the good faith belief that such preservation or disclosure is reasonable necessary to:

(a) comply with legal process;

(b) enforce the License Agreement;

(c) respond to claims that any content violates the rights of third parties; or

(d) protect the rights, property or personal safety of MusicCity Networks, its users and the public;

5. Payment and fees

Certain features of MusicCity Networks or the Morpheus Client software may require payment. You shall pay all fees and charges incurred through your account at the rates in effect for the billing period in which such fees and charges are incurred. All fees and charges shall be billed to you and you shall be solely responsible for their payment. You shall pay all applicable taxes relating to the use of the Service through your account. Certain portions of the Service or the Service as a whole may require a prepaid fee ("Prepaid Fee"). The Prepaid Fee, and all taxes and other fees related thereto will be paid by you in advance. In no event will you receive any portions of the Service of the Service as a whole if a Prepaid Fee is required unless MusicCity Networks receives all fees and charges payable by you, including the Prepaid Fee. If you do not pay the applicable fees within the prescribed period of time, your account will be terminated immediately, without limiting MusicCity Networks' right to demand payment of fees and damages at a later time.

6. MusicCity Networks' Policy Against Child Pornography

We do not tolerate child pornography on the MusicCity network and we urge all users to report any such instance directly to us upon discovery that another MusicCity Networks user is sharing child pornography on the MusicCity network. Please contact us on abuse @MusicCity.com.

PLEASE OBSERVE THAT THE DISTRIBUTION OF CHLD PORNOGRAPHY IS A CRIMINAL OFFENSE IN MOST COUNTRIES. IF YOU SHARE CHILD PORNOGRAPHY, YOU RUN THE RISK OF BEING PROSECUTED, FINED OR IMPRISIONED. A number of non-profit organizations and individuals are actively seeking out child pornography on the Internet and reporting the incidents to the legal authorities. MusicCity Networks will cooperate with legal authorities to identify traffickers of any illegal content or persons engaged in illegal activity under the laws of the United States of America. Parental supervision is urged to ensure that no minors have access to materials that may be deemed to be inappropriate for children.

7. MusicCity Networks Copyright Infringement Policy

MusicCity Networks respects and desires to protect the right of copyright owners. We ask all users to avoid violating copyright laws and regulations. Unauthorized copying, distribution, modification, public display, or public performance of copyrighted works is an infringement of copyright holders' rights. Your license to use MusicCity Networks service and Morpheus Client software is subject to the condition that you shall not infringe the intellectual property rights of others in any way. MusicCity Networks shall have the right to terminate the account of any MusicCity Networks users who repeat copyright infringements. Please refer the MusicCity Networks' Repeat Copyright Offender Policy (as set forth below).

MusicCity Networks reserves the right to unilaterally terminate the account of any person, to the technically feasible to do so, (a) upon any single act of infringement in conjunction with the use of MusicCity Networks, (b) if MusicCity Networks in its sole discretion believes that

person's conduct is harmful to the interests of MusicCity Networks, other MusicCity Networks users or other MusicCity Networks affiliate partners or (c) for any other reason in MusicCity Networks sole discretion, with or without cause.

If you are a copyright owner or are authorized to act on behalf of one and discover cases of alleged infringement of your copyrighted work, please contact us in accordance with our Policy section on the MusicCity.com website.

MusicCity Networks is technically not able to monitor the information users transmit or store when using the MusicCity network. Please note that in many countries, the monitoring of users in any communications network would amount to an infringement of their privacy. However we will comply with requests by national judicial authorities for information, about our users in accordance with national legislation to safeguard national security defense, public security and for the prevention, investigation, detection and prosecution of criminal offenses.

8. MusicCity Networks Repeat Copyright Offender Policy

MusicCity Networks will, to the extent technically possible, terminate the accounts of users who violate copyrights or other intellectual property rights of third parties if we receive <actual knowledge> of their infringing activities. Actual knowledge means in any case a ruling from a judge stating that the user has infringed copyrights or other intellectual property rights or other such documentation that conforms to the applicable laws where such infringement is alleged. Those users deemed "repeat offenders" by MusicCity Networks will have their MusicCity Networks account permanently cancelled, to the extent technically feasible to do so. Our repeat offender policy is as follows:

If any MusicCity Networks user who has been the subject of a complaint from or on behalf of a content owner that submits a letter in writing stating a name and sufficient fact of repeat copyright infringement, under accordance of the MusicCity Networks Policy (found on the MusicCity.com web site) we shall use our best efforts to contact directly to the user asking either (a) to stop violating copyright laws or (b) file a counter-argument in case the user feel that one has been unrightfully accused.

If the repeat copyright offender does not reply in writing within 48 hours after our notification, we shall permanently terminate the account, to the extent technically possible without prior notice.

If the repeat copyright offender chooses not to comply, the copyright holder may pursue their legal remedies directly.

Any MusicCity Networks users who have had its account terminated shall not be permitted to re-register to MusicCity Networks at any time.

Each MusicCity Networks user is allowed to have only one active registration or account at any given time. Any MusicCity Networks user found to have more than one active registration or account at any time shall have all their accounts permanently cancelled, to the extent technically feasible to do so.

MusicCity Networks will enforce this policy to the extent it is technically feasible to do so.

In the event that a court of law holds that a MusicCity Networks user eliminated from the network under this policy did not in fact infringe another's rights or otherwise violate the law, MusicCity Networks may re-institute such person's account upon receipt of the applicable court judgment or order.

9. Other Terminations of the MusicCity Networks Account

All users should understand that MusicCity Networks has a no-tolerance policy with respect to child pornography and other obscene material. If at any time, MusicCity Networks finds that you are using MusicCity Networks to collect or distribute child pornography or other obscene material, we reserve the right to permanently ban you and your computers from accessing MusicCity Networks and other MusicCity Networks services. You agree that any termination of your access to MusicCity Networks may be effected without prior notice and acknowledge and agree that we may immediately deactivate or delete your MusicCity Networks account and all related information and files and/or ban any further access to such files, to the extent technically feasible to do so.

10. MusicCity Networks' Right to Display Advertising Without Compensation to Users

MusicCity Networks reserves the right to display advertisements and promotions on all pages of the MusicCity Networks web sites and the Morpheus client. By accessing your MusicCity Networks accounts, you agree that we have the right to distribute such advertisements and promotions without compensation to you. The timing, frequency, placement and extent of advertising by us within the page comprising your MusicCity Networks account is subject to change and shall be determined by us in our sole discretion. Your correspondence or business dealings with or participation in promotions of advertisers found on or through the MusicCity Networks web sites or Morpheus Client, including payment and delivery of related goods or services and any other terms, conditions, warranties or representations associated with such dealings are solely

between you and such advertiser. You agree that Music City Networks will not be responsible or liable for any loss or damage of any sort incurred as the result of any such dealings or as the result of the presence of such advertisers on the MusicCity Networks web sites or Morpheus Client.

11. Links to Third-Party Sites

MusicCity Networks or the Morpheus Client may provide, or third parties may provide, links to other World Wide Web sites or other Internet resources. Any third-party sites to which MusicCity Networks may link are not under control of MusicCity Networks. MusicCity Networks does not have any responsibility or liability for any information , contents, communications or materials available on such third-party sites.

12. Applicable law

The Legal and Terms of Service as well as all disputes arising out of or in connection with this terms shall be governed by the laws of the United States of America without regard to or application of choice of law rules or principles.

Any dispute arising out of or in connection with this Legal and Terms of Service, or in future agreements resulting there from, shall be exclusively resolved before the applicable court in the United States of America.

13. Special Admonitions for International Use

Recognizing the global nature of the Internet, you agree to comply with all local rules regarding online conduct and acceptable content. Specifically, you agree to comply with all applicable laws regarding copyright and the transmissions of technical data exported from the country in which you reside.

14. Indemnification

MusicCity Networks users agree to indemnify and hold MusicCity Networks and its subsidiaries, affiliates, officers, agents, co-branders or other partners and employees harmless from any claim or demand, including reasonable attorneys' fees made by any third party due to or arising out of content you submit, post to or transmit through the Service, your use of the Service, your connection to the Service, your violation of these notices, terms and conditions, or your violation of any rights or another.

BY USING MUSICCITY NETWORKS, YOU ACKNOWLEDGE THAT YOU HAVE READ AND AGREE TO BE BOUND BY THESE NOTICES, TERMS AND CONDITIONS. YOU FURTHER AGREE THAT THE MUSICITY NETWORKS/MORPHEUS CLIENT SOFTWARE AGREEMENT, WHICH INCLUDES THIS MUSICCITY NETWORKS LEGAL NOTICE AND TERMS OF SERVICE AND THE OTHER POLICIES AND DOCUMENTS POSTED ON THE MORPHEUS CLIENT AND THE MUSICCITY NETWORKS WEB SITES WHICH MAY BE MODIFIED FROM TIME TO TIME BY MUSICCITY NETWORKS AND ANY OTHER MATERIALS EXPRESSLY INCORPORATED HEREIN BY REFERENCE ARE THE COMPLETE AND EXCLUSIVE STATEMENT OF THE RIGHTS AND LIABILITIES OF THE PARTIES, AND SUPERSEDE ANY AND ALL PRIOR AND CONTEMPORANEOUS WRITTEN OR ORAL AGREEEMENTS EXISTING BETWEEN THE PARTIES WITH RESPECT TO SUCH SUBJECT MATTER.

15. Modifications to or Suspension of Service

MusicCity Networks reserves the right to modify or discontinue the Service temporarily or permanently, at any time, with or without notice. MusicCity Networks will

attempt to provide reasonable notice of such changes to the services or the site.

16. MusicCity Networks Proprietary Rights

The MusicCity Networks name, the MusicCity Networks logo and other MusicCity Networks related properties are trademarks of MusicCity Networks. All other trademarks appearing on the Service are trademarks of their respective owners. The Morpheus logo and trademark are the property of SCN. All rights reserved.

17. Disclaimer of Warranties.

The services, content, audio transmissions or other date of any kind or nature made available at the site are provided "AS IS" and "AS AVAILABLE" basis or at the specific providers own terms. All representations and warranties, either express or implied are disclaimed including but not limited to warranties of title, non-infringement, merchantability or fitness for a particular purpose. MusicCity Networks makes no warranty, representation or guaranty as to the content, accuracy, timeliness or completeness of the site or the information or that the information may be relied upon for any reason. Any material downloaded through the service is done at your own discretion and risk and that you will be solely responsible for any damage to your computer system or loss of data that results from the download or use of any such material.

18. Limitation of Liability

You understand and agree that MusicCity Networks shall not be liable for any direct, indirect, incidental, special, consequential or exemplary damages, including but not limited to damages for loss of profits, goodwill, use, data or other intangible losses resulting from:

(i) the use or the inability to use the service;

(ii) the cost of procurement of substitute goods, data, information or services purchased or obtained or messages received or transactions entered into through or from the service;

(iii) unauthorized access to or alteration of your transmissions or data;

(iv) statements or conduct of any third party on the service; or

(v) any other matter relating to the service.

19. Notice

The Service may provide notices of changes to the License Agreement or other matters by displaying notices or links to notices to you generally on the Service or on the MusicCity.com website.

You are obliged to update your knowledge hereto continuously. Lack of knowledge does not imply that these terms are not accepted by you.

20. Miscellaneous

These Terms of Service constitute the entire understanding of you and MusicCity Networks with respect to the subject matter hereof. There are no understandings, agreements, conditions or representations, oral or written, express or implied, with reference to the subject matter hereof that are not merged herein, expressly referenced herein or superseded hereby.

You also may be subject to additional terms and conditions that may apply when you use affiliate services, third-party content or third-party software.

The failure or delay of MusicCity Networks to exercise or enforce any rights or provision of the Terms of Service may not constitute a waiver of such right or provision.

All provisions which must survive in order to give effect to their meaning shall survive any expiration or termination of these Terms of Service, including without limitation all of your representations, warranties and indemnification obligations.

Should any part of these Terms of Service be held invalid by any court or tribunal, such invalidity shall not affect the validity of any remaining part which will remain in full force and effect as if these Terms of Service had been executed without the part having been held to be invalid.

April 2001

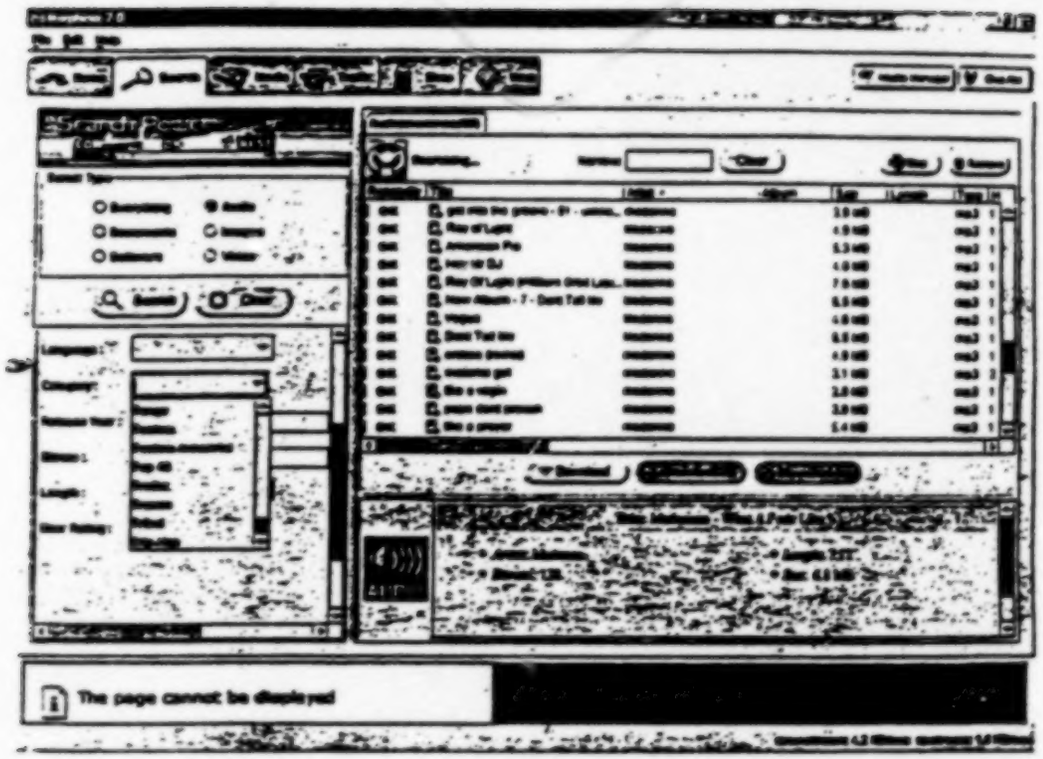

Exhibit 228
JEER
ACLU C. Beckman

Exh. 69, Pg 3884

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed Oct. 21, 2002]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

DEFENDANT GROKSTER, LTD.'S STATEMENT OF GENUINE ISSUES OF MATERIAL FACT

Pursuant to Central District of California Civil Local Rule 56-2, Grokster, Ltd. ("Grokster") submits this Statement of Genuine Issues of Material Fact in opposition to Plaintiffs' motion for summary judgment. Genuine issues to be litigated exist as to following material facts, such that the Court should deny Plaintiffs' motion.[1]

DISPUTED MATERIAL FACTS

1. Grokster disputes Plaintiffs' purported "*Uncontroverted Fact No. 1*: Plaintiffs own or control the copyrights, or exclusive rights under copyright, in the works at issue." The movie and record industry Plaintiffs are currently misusing their copyrights in the works at issue,

[1] By failing to address a purportedly "uncontroverted fact" contained in Plaintiffs' [Proposed] Statement of Uncontroverted Facts, Grokster does not concede that such purported fact is uncontroverted. Rather, pursuant to the Court's rules, Grokster only addresses herein those "facts" *material* to deciding Plaintiffs' motion. Nor does Grokster's failure to address herein Plaintiffs' "brief description[s] of the evidence" constitute an admission that such descriptions are either accurate or relevant to deciding Plaintiffs' motion.

thereby precluding them from enforcing those copyrights. Grokster has presented evidence that raises a genuine issue of fact as to whether Plaintiffs have engaged in a variety of practices that violate the antitrust laws, and therefore also constitute copyright misuse. Declaration of Michael H. Page in Opposition to Plaintiffs' Motion for Summary Judgment ("Page Opp. Decl."), Exhs. B through I.

2. Grokster disputes Plaintiffs' purported "*Uncontroverted Fact No. 2*: Users of Defendants' systems have made available for copying (distributed) Plaintiffs' copyrighted works on the systems without Plaintiffs' authorization." The evidence Plaintiffs cite - that their works are available on the hard drives of some users of Grokster's software and that Plaintiffs themselves downloaded those works - does not suffice to establish that users of Grokster's software "distributed" Plaintiffs' copyrighted works. Page Opp. Decl., Exh. A.

3. Grokster disputes Plaintiffs' purported "*Uncontroverted Fact No. 3*: Defendants have both actual and constructive knowledge that the users of their systems engage in acts of copyright infringement." Grokster has presented evidence that it has neither actual nor constructive knowledge of infringing activities by users of the Grokster software program. The Grokster application's filesharing functions operate entirely independently of Grokster. At no time during the process of searching for or downloading files does the Grokster application transmit any information to Grokster or any computer operated by Grokster. Grokster therefore has no access to any information concerning the activities of its users. Declaration of Daniel B. Rung submitted in support of Grokster's Motion for Summary Judgment ("Rung Decl.") at ¶¶ 5-6.

In addition, in many instances, the evidence Plaintiffs cite against "Defendants" does not relate in any way to Grokster,

e.g., 3(i) (purporting to show that "MusicCity tested its system by searching for copyrighted music."), 3(1) (purportedly describing evidence that "*Defendants* promoted their systems with materials featuring examples of infringing files," but citing no evidence relating to *Grokster*), 3(m) (purporting to show that "*Kazaa* sent technical documents to *MusicCity* that demonstrated operation of the FastTrack technology with examples showing searches for and downloading of infringing works."), 3(r) (purportedly describing evidence that "*Defendants* have discussed paying copyright owners when their works are distributed over *Defendants'* systems," but citing no evidence relating to *Grokster*).

4. Grokster disputes Plaintiffs' purported "*Uncontroverted Fact No. 4*: Defendants materially contribute to their users' acts of direct copyright infringement." Grokster has presented evidence that it does not participate *in any way* in its users' alleged acts of copyright infringement. Grokster does not participate in any indexing of, searching for, copying, transferring, or downloading of, or playing of any of Plaintiffs' copyrighted works by its customers. *See* Rung Decl. at ¶¶ 3-9. 16.

In addition, in many instances, the evidence Plaintiffs cite against "Defendants" does not relate to Grokster in any way, e.g., 4(g), 4(i), 4(m), 4(o) (all purporting to describe actions "Defendants" have taken, but citing against *Grokster* only evidence relating to the other defendants' alleged activities). In other instances, the evidence Plaintiffs cite against Grokster is not consistent with Plaintiffs purported "description" of that evidence, e.g., 4(b), (D. Rung Depo. Tr. 180:2-185:5, wherein Rung states that he responds to support e-mails by just looking at the title to figure out the technical problem and states that he responds to 100 - 200 support e-mails per day) and GR 06581 [D. Rung Depo. Exh 61]); *see*

also Page Opp. Decl., Exh. N (D. Rung Depo. Tr. at 193:5-195:8).

5. Grokster disputes Plaintiffs' purported "*Uncontroverted Fact No. 6*: Defendants have the right and/or ability to supervise and/or control the infringing activities of users on their systems." Grokster has presented evidence that it has neither the right nor the ability to supervise or control the alleged infringing activities of its users. Grokster has no access to, or control over, the source code or other technological information concerning the operation of the FastTrack P2P Stack, and has no ability or right to modify or control the manner in which the filesharing functions of that software operates. Rung Decl. at ¶ 3. Grokster does not have the ability to block, filter, supervise, or control in any way the activity of the users of the Grokster application. Rung Decl. ¶¶ at 5-6.

In addition, in many instances, the evidence Plantiffs cite against "Defendants" does not relate to Grokster in any way, e.g., 6(h) (purporting to describe evidence that "Defendants" have the ability to change, and thus control, the system communications protocol and encryption, but citing no evidence as to *Grokster)*, 6(j) (purporting to describe evidence that "*Defendants* have controlled access to their system by adding a layer of security to prevent further access to communications port 1214 by any unauthorized client applications," but citing no evidence as to *Grokster*), 6(l) (purporting to describe evidence that "*Defendants* have exercised control over their system by taking affirmative steps to prevent access by firms retained by copyright owners to monitor and police copyright infringement on *defendants'* systems," but citing no evidence as to *Grokster*), 6(m) (relating to *Kazaa's* apparent blocking of access to MusicCity users; *see* Borkowski Decl., Exh 5 [D. Rung Depo. Tr. at 107:17-111:6, 241:9-242:12; 257:16-24]).

Moreover, none of the "evidence" cited by Plaintiffs supports the assertion that Grokster has control over *its users' alleged acts of direct copyright infringement*, e.g., 6(a) (simply stating that Defendants provide their users with the software).

6. Grokster disputes Plaintiffs' purported "*Uncontroverted Fact No. 7*: Defendants have the ability to identify and prevent distribution of infringing works." Grokster has presented evidence that it does not have the ability to block, filter, supervise, or control in any way the activity of the users of the Grokster application. Rung Decl. ¶¶ at 5-6. Grokster has likewise presented evidence that it has no access to the source code for the Grokster application, that it has been rebuffed in its efforts to obtain the source code from Kazaa, and does not even know where the source code is located. Rung Decl., ¶ 3; Page Opp. Decl., Exh. N (D. Rung Depo. Tr. at 123:9-25); *see also* Page Opp. Decl., Exhs. L (Griffin Depo. Tr. at 227:13-228:14) and M (Kleinrock Depo. Tr. at 211:13-212:17). Grokster has further presented evidence that the "fingerprinting" technologies Plaintiffs cite, *see*, e.g., 7(c) and (d), are neither feasible nor commercially available. *See* Page Opp. Decl., Exhs. O, P, and Q (excerpts of deposition transcripts of Patrick Breslin, David Hyman, and Vance Ikezoye, respectively) and Exh. J. Moreover, Plaintiffs themselves have admitted that "'text-based filtering' ... cannot effectively filter copyrighted works in an online environment." Page Opp. Decl., Exh. K.

DISPUTED FACTS AS TO *SONY* DEFENSE

7. Grokster disputes Plaintiffs' purported "*Uncontroverted Fact No. 8*: Defendants do not merely distribute a software product - they operate systems and provide services." This "fact" is immaterial because the relevant standard under *Sony* is whether Grokster "with

knowledge of the infringing activity, induces, causes, or materially *contributes to the infringing conduct of another*." *A&M Records v. Napster*, 239 F.3d 1004, 1019 (9th Cir. 2001). Grokster has presented evidence that it simply distributes the Grokster software and does not participate *in any way* in any indexing of, searching for, copying, transferring, or downloading of, or playing of any of Plaintiffs' copyrighted works by its customers. *See* Rung Decl. at ¶¶ 3-9. Thus, any other "services" Grokster may provide are irrelevant.

Moreover, in many instances the evidence Plaintiffs cite against "Defendants" does not relate in any way to Grokster, e.g., 8(b) (purporting to describe evidence relating to MusicCity's description of its "system"), 8(c) (purporting to describe evidence that "*Defendants* have operated central servers that stay in regular communication with their users' computers," but citing no evidence as to *Grokster*), 8(d) (purporting to describe evidence that "Users' computers receive 'parametric values' from *Defendants*' servers…," but citing no evidence as to *Grokster*).

8. Grokster disputes Plaintiff's purported "*Uncontroverted Fact No. 9*: Defendants maintain continuous relationships with their users." This "fact" is immaterial because the relevant standard under *Sony* is whether Grokster "with knowledge of the infringing activity, induces, causes, or materially contributes to the *infringing conduct of another*." *A&M Records v. Napster*, 239 F.3d 1004, 1019 (9th Cir. 2001). Grokster has presented evidence that it simply distributes the Grokster software and does not participate *in any way* in any indexing of, searching for, copying, transferring, or downloading of, or playing of any of Plaintiffs' copyrighted works by its customers. *See* Rung Decl. at ¶¶ 3-9. The evidence cited by Plaintiffs regarding Grokster's "relationship" with its users bears no relation to

the alleged direct infringements, e.g., 9(h) (Grokster provides its users with newsletters), and is thus irrelevant.

Moreover, in many instances the evidence Plaintiffs cite against "Defendants" does not relate in any way to Grokster, e.g., 9(a) (purporting to describe evidence that "*Defendants* operate central servers that stay in constant communication with their users' computers," but citing no evidence as to *Grokster*); *see also* 9(d), 9(e), 9(f).

9. Grokster disputes Plaintiff's purported "*Uncontroverted Fact No. 10*: Defendants' systems were and are designed to infringe copyrights." This fact is immaterial, as *Sony* contains no "designed for infringing use" limitation, and is almost wholly unsupported by evidence against Grokster. *See, e.g.*,4(o), 5(f) (citing *no* evidence as to *Grokster*). Moreover, Grokster did not "design" a product *at all*. Grokster's intent in distributing its software - if any - is to promote independent artists. Rung Decl. at ¶ 10; Declaration of Scott Egbert submitted in support of Grokster's Motion for Summary Judgment ("Egbert Decl.") at ¶¶ 5-9; Declaration of Sean Mayers submitted in support of Grokster's Motion for Summary Judgment, ("Mayers Decl.")at ¶ 9.

Dated: October 18, 2002 KEKER & VAN NEST, LLP

By: /s/
MICHAEL H. PAGE
Attorneys for Defendant
GROKSTER, LTD.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed Oct. 21, 2002]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

DEFENDANTS MUSICCITY.COM, INC. (NOW KNOWN AS STREAMCAST NETWORKS, INC.) AND MUSICCITY NETWORKS, INC.'S STATEMENT OF GENUINE ISSUES OF MATERIAL FACT IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56-2, Defendants MusicCity,com, Inc. (now known as StreamCast Networks, Inc.) and MusicCity Networks, Inc. (collectively hereafter "StreamCast") submit this Statement of Genuine Issues of Material Fact in Opposition to Plaintiffs' Motion for Summary Judgment on Liability.

GENERAL RESPONSE

Many of Plaintiffs' alleged uncontroverted facts and conclusions of law refer in some form or fashion to "systems" that are allegedly owned and/or operated by Defendants. StreamCast disputes any and all allegations that it owns, operates, or controls any "system." Rather, StreamCast distributes a software product that allows users to connect together to form a self-organizing network for peer-to-peer resource sharing. Smith Opp. Decl., ¶ 34; Gribble

Opp. Decl. ¶ 4. StreamCast expressly incorporates this General Response as if fully set forth in each specific response hereafter.

GENUINE ISSUES OF MATERIAL FACT

Plaintiffs' Alleged Uncontroverted Fact No. 1:

Plaintiffs own or control the copyrights, or exclusive rights under copyright, in the works at issue.

StreamCast's Response to Plaintiff's Alleged Uncontroverted Fact No. 1:	
NOT DISPUTED (for summary judgment purposes only) as to the Record Company Plaintiffs and the Motion Picture Studio Plaintiffs. *See* StreamCast's Responses to (a) & (b) below. DISPUTED as to the Music Publisher Plaintiffs. *See* StreamCast's Response to (c) below.	
PLAINTIFFS' EVIDENCE	**STREAMCAST'S RESPONSE**
(a) The Record Company Plaintiffs own or control the copyrights, or exclusive rights under copyright, in the sound recordings listed in Exhibit B to the MGM Plaintiffs' First Amended Complaint. Cottrell Decl. ¶¶ 3-5; Eisenberg Decl. ¶¶ 3-5; Ferguson Decl., ¶¶ 3-5; Leak Decl. ¶¶ 3-5; Ostroff Decl., ¶¶ 3-5; C. Robinson Decl. ¶¶ 3, 5-6;	NOT DISPUTED (for summary judgment purposes only). StreamCast and the Record Company Plaintiffs have stipulated for summary judgment purposes that the copyrights to sound recordings listed in Exhibit B to the MGM Plaintiffs' First Amended Complaint are owned by each Record Company Plaintiff asserting ownership. Lapple Decl. **Ex. 10**. StreamCast has reserved the right to dispute this fact in later proceedings.

Seklir Decl. ¶¶ 3-5.	
(b) The Motion Picture Studio Plaintiffs' own or control the copyrights, or exclusive rights under copyright, in the motion pictures listed in Exhibit A to the MGM Plaintiffs' First Amended Complaint. Jussim Decl. ¶ 3; Martin Decl. ¶ 3; McGuire Decl. ¶ 3; Moore Decl. ¶ 3; C. Robinson Decl. ¶ 4; Villalobos Decl. ¶ 3; Williams Decl. ¶ 4; Zinkin Decl. ¶ 4.	NOT DISPUTED (for summary judgment purposes only). StreamCast and the Motion Picture Studio Plaintiffs have stipulated for summary judgment purposes that the copyrights in the motion pictures listed in Exhibit A to the MGM Plaintiffs' First Amended Complaint are owned by each Motion Picture Studio Plaintiff asserting ownership. Lapple Decl. **Ex. 10**. StreamCast has reserved the right to dispute this fact in later proceedings.
(c) The Music Publisher Plaintiffs own or control the copyrights in the musical compositions listed in their Second Supplemental Rule 26 Disclosures. Breen Decl. ¶ 7 & Ex. A; Dozier Decl. ¶¶ 8, 10 & Exs. A-B; Stoller Decl. ¶¶ 17-21 & Exs. B-F; Leiber Decl. ¶ 3; Jaegerman Decl. ¶¶ 5-7 & Exs. A-E; Goldsen Decl. ¶ 4 & Exs. A-E; I. Robinson Decl. ¶¶ 6-8, Ex. A-E.	DISPUTED. The Music Publisher Plaintiffs have refused to stipulate to this fact for summary judgment purposes only. Therefore, StreamCast requests, pursuant to Fed. R. Civ. P., 56(f), that it be granted additional time to conduct discovery regarding the Music Publisher Plaintiffs' ownership or control of copyrights to the musical compositions listed in their Second Supplemental Rule 26 Disclosures. Upon information and belief,

	StreamCast contends that discovery on this issue will produce evidence to show that the Music Publisher Plaintiffs do not actually own or control the copyrights to several of the musical compositions asserted in this case.

Plaintiffs' Alleged Uncontroverted Fact No. 2:

Users of Defendants' systems have made available for copying (distributed) Plaintiffs' copyrighted works on the systems without Plaintiffs' authorization.

StreamCast's Response to Plaintiffs' Alleged Uncontroverted Fact No. 2:

DISPUTED as to the Record Company Plaintiffs. The Record Company Plaintiffs have failed to verify that each of the sound recordings they allegedly downloaded were the actual sound recordings they purported to be. In addition, the Record Company Plaintiffs have failed to identify which sound recordings were allegedly downloaded by means of the Morpheus software and which sound recordings were allegedly downloaded by means of another entity's software. Furthermore, the Record Company Plaintiffs have failed to submit any evidence that they actually downloaded and verified the sound recordings at issue. Finally, some of the Record Company Plaintiffs' summary judgment evidence regarding this fact is based upon hearsay, and is therefore, inadmissible.

DISPUTED as to the Motion Picture Studio and Music Publisher Plaintiffs. StreamCast does not dispute that the Motion Picture Studio Plaintiffs and Music Publisher Plaintiffs have downloaded the copyrighted works at issue by

using the Morpheus software product. However, StreamCast disputes that the evidence cited by the Motion Picture Studio and Music Publisher Plaintiffs proves that the works at issue were made available for download by a specific Morpheus user.	
PLAINTIFFS' EVIDENCE	**STREAMCAST'S RESPONSE**
(a) Plaintiffs have downloaded from users of Defendants' systems all of the sound recordings listed in Exhibit B to the MGM Plaintiffs' First Amended Complaint. Creighton Decl. ¶¶ 16-17, 21, 24, 27-28 & Exs. 7, 18, 21-23.	DISPUTED. The Record Company Plaintiffs have failed to submit any evidence that the sound recordings they allegedly downloaded by means of Morpheus were the actual sound recordings they purported to be. Lapple Decl. **Ex. 4** (Creighton Depo. T.) 38:17-40:12, 125:19-128:5. In addition, the evidence submitted by the Record Company Plaintiffs fails to show that the sound recordings they allegedly downloaded were made available for download (distributed) by a specific user of Morpheus. At most, the evidence submitted by the Record Company Plaintiffs shows that files allegedly containing sound recordings were downloaded from a "shared folder" on a computer then-connected to

	the FastTrack and/or Gnutella user networks. Accordingly, the files allegedly downloaded by the Record Company Plaintiffs could have been made available for download by someone other than a Morpheus user (i.e., a user of Grokster, Kazaa, BearShare, LimeWire, Xolox, etc.). Finally the Record Company Plaintiffs have failed to identify which sound recordings were allegedly downloaded by using Morpheus and which sound recordings were allegedly downloaded using another entity's software. Creighton Decl. ¶ 17 & Ex. 7; Lapple Decl. **Ex. 4** (Creighton Depo. T.) 156:5-159:1. Consequently, the evidence submitted by the Record Company Plaintiffs fails to prove any direct infringement as a matter of law.
(b) Plaintiffs have downloaded from users of Defendants' systems all of the motion pictures listed in Exhibit A to the MGM	DISPUTED IN PART. StreamCast does not dispute that the Motion Picture Studio Plaintiffs have downloaded the motion

Plaintiffs' First Amended Complaint. Cole Decl. ¶¶ 2-3.	pictures listed in Exhibit A to the MGM Plaintiffs' First Amended Complaint by using the Morpheus software product. However, StreamCast disputes that the evidence cited proves that the motion pictures at issue were made available for download (distributed) by a specific Morpheus user. At most, the evidence cited shows that the motion pictures were downloaded from a computer then-connected to the FastTrack and/or Gnutella networks. Accordingly, the motion pictures downloaded could have been made available for download by someone other than a user of Morpheus (i.e., a user of Grokster, Kazaa, BearShare, LimeWire, Xolox, etc.).
(c) Plaintiffs have downloaded from users of Defendants' systems all of the musical compositions listed in the Music Publisher Plaintiffs' Second Supplemental Rule 26 Disclosure. Breen Decl. ¶¶ 6,	DISPUTED IN PART. StreamCast does not dispute that the Music Publisher Plaintiffs have downloaded the musical compositions listed in the Music Publisher Plaintiffs' Second Supplemental Rule 26 Disclosures by using the

11, 13-15, 17-18 & Exs. B-E.	Morpheus software product. However, StreamCast disputes that the evidence cited proves that the musical compositions at issue were made available for download (distributed) by a specific Morpheus user. At most, the evidence cited shows that the musical compositions were downloaded from a computer then-connected to the FastTrack and/or Gnutella networks. Accordingly, the musical compositions downloaded could have been made available for download by someone other than a user of Morpheus (i.e., a user of Grokster, Kazaa, BearShare, LimeWire, Xolox, etc.
(d) Plaintiffs have not authorized Defendants or their users to distribute or reproduce the works at issued by meansof Defendants' systems. Brown Decl. ¶ 4; Charlesworth Decl. ¶¶ 4-19, Ex. A-P; Cottrell Decl. ¶ 5; Creighton Decl., ¶ 27; Dozier Decl. ¶ 13; Eisenberg Decl. ¶ 5; Ferguson Decl. ¶ 5; Goldsen Decl ¶ 5; Jaegerman Decl. ¶ 8; Jussim Decl., ¶ 6;	NOT DISPUTED IN PART. StreamCast does not dispute that it has not been authorized to distribute or reproduce the works at issue. However, StreamCast lacks sufficient information to dispute or not dispute whether Plaintiffs have authorized the individual users of Morpheus to distribute or reproduce the

Leak Decl. ¶ 5; Leff-Pressman Decl. ¶ 4; Lieber Decl. ¶ 2; Martin Decl. ¶ 6; Moore Decl. ¶ 6; Ostroff Decl. ¶ 5; C. Robinson Decl. ¶ 6; I. Robinson Decl. ¶ 9; Sanders Decl. ¶ 18; Seklir Decl. ¶ 5; Stoller Decl. ¶¶ 11-12; Williams Decl. ¶ 6; Zinkin Decl. ¶ 6.	works at issue.
(e) Plaintiffs located unauthorized copies of ever one of the Billboard "Hot 100 Singles" on Defendants' system. Creighton Decl. ¶¶ 24, 27-28 & Ex. 18, 21-23.	DISPUTED. This alleged fact is not supported by admissible summary judgment evidence. Mr. Creighton testified at his deposition that the Record Company Plaintiffs did not actually download and verify the Billboard "Hot 100 Singles" themselves. Instead, the Record Company Plaintiffs relied upon a third party, Net PD, to actually download and verify these sound recordings by means of Defendants' software. Lapple Decl. **Ex. 4** (Creighton Depo. T.) 92:14-94:17. Accordingly, Mr. Creighton's Declaration (and Exhibits 18, 21-23 thereto) is based upon hearsay and is therefore inadmissible. Moreover, there is no

	evidence that any of these alleged downloads were made available for download (distributed) by a specific user of Morpheus.

Plaintiffs' Alleged Uncontroverted Fact No. 3:

Defendants have both actual and constructive knowledge that the users of their systems engage in acts of copyright infringement.

StreamCast's Response to Plaintiffs' Alleged Uncontroverted Fact No. 3:

DISPUTED. Where a technology capable of substantial noninfringing uses is concerned, constructive knowledge of infringing activity is insufficient to establish contributory infringement liability. *See Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984) (hereinafter "*Sony-Betamax*"); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1021 (9th Cir. 2001) (hereinafter "*Napster*"). As shown in StreamCast's Motion for Partial Summary Judgment Regarding Contributory Infringement (and evidence in support thereof), it is undisputed that Morpheus is capable of substantial non-infringing uses. Therefore, all of Plaintiffs' purported evidence regarding StreamCast's alleged constructive knowledge of infringement is irrelevant. Moreover, Plaintiffs' purported evidence fails to prove, as a matter of law, that StreamCast has actual knowledge of infringement. In order to establish the specific knowledge required under *Napster*, a copyright holder must not only provide documentation showing the existence of a likely infringement, but the copyright holder must also show that the defendant, after learning of the alleged infringement, had the ability to act on such knowledge and failed to do so. *See Napster*, 239 F.3d at 1021. Plaintiffs' purported evidence

regarding StreamCast's alleged actual knowledge fails to meet this standard.	
PLAINTIFFS' EVIDENCE	**STREAMCAST'S RESPONSE**
(a) Plaintiffs have sent notices to Defendants listing millions of Plaintiffs' works that are being distributed on Defendants' systems. Creighton Decl. ¶¶ 9, 13, 18-20 & Exs. 2, 5, 9-17; Charlesworth Decl. ¶¶ 4-19 & Exs. A-P; Jacobsen Decl. ¶¶ 7-18.	DISPUTED. StreamCast does not dispute that Plaintiffs have sent it letters containing reports of files that allegedly existed within the "shared file" folders of various FastTrack or Gnutella users. However, StreamCast disputes that these "notices" provide information sufficient to enable StreamCast to act, and disputes that these "notices" complied with the notice requirements enunciated by the Ninth Circuit in *Napster*, Indeed, the "notices" sent by Plaintiffs to StreamCast are materially defective in that they failed to adequately notify StreamCast of sufficient information to permit it to comply with the notices, and/or they failed to notify StreamCast that users of its software were possibly committing copyright infringement. For example, the "notices" attached as

	Exhibits 2 & 5 to the Creighton Declaration purport to list "a sampling of the infringing works on your system." Yet, the files listed were apparently compiled by a search of the openNap servers operated by StreamCast in early 2001. Therefore, these "notices" are irrelevant to the subject of this litigation - the Morpheus software product. In addition, the "notices" sent to StreamCast after the April 2001 release of Morpheus (Creighton Decl. Ex. 8; Jacobsen Decl. Ex. 1-3) are likewise defective, because the attachments to these "notices" list only file names and usernames conducted by a search of the entire FastTrack user network. Lapple Decl. Exs. 14 & 15. Thus, these attachments list many files and users of other FastTrack clients, including Grokster and Kazaa. Moreover, subsequent "notices" dated December 20, 2001 (Creighton Decl. Ex. 9), January 24, 2002 (Creighton Decl. Ex. 10) and February

	5, 2002 (Creighton Decl. Ex. 11) suffer the same deficiency. At best, these "notices" show that some user or users of one or more FastTrack clients (including Grokster and Kazaa) have placed files containing potentially copyrighted content in a "shared file" folder on a computer then-connected to the FastTrack network. However, these "notices" fail to indicate whether the users are Morpheus users or users of some other FastTrack client. Similarly, other "notices" dated April 3, 2002 to September 3, 2002 (Creighton Decl. Exs. 12-17; Charlesworth Decl. Exs. A-D) arrived after Morpheus was redesigned to interoperate with all other Gnutella clients and cite only the title of the files Plaintiffs claim as their copyrighted material. These notices do not identify a username or whether the files existed on a Morpheus client or on another of the many Gnutella clients (such as Xolox, Bearshare, Gnucleus,

	LimeWire, Phex, Shareaza, Swapper, Gtk-Gnutella, Mutella, Qtella an others). StreamCast maintains no relationship whatsoever with users of non-Morpheus P2P clients and, as such, StreamCast is powerless to take any action in response to a "notice" against any non-Morpheus user alleged to be making certain files available to other users of the Gnutella Network. In addition, none of the "notices" cited by Plaintiffs distinguish between Morpheus versus non-Morpheus users. Therefore, all of the "notices" fail to show that any alleged direct infringer used Morpheus to make files available for downloading. Moreover, there is simply insufficient evidence to show that at the time these notices were sent to StreamCast, the Plaintiffs had actually determined that direct copyright infringement of the works at issue had in fact occurred. Lapple Decl. Ex. 4 (Creighton Depo. T.) 38:17-40:12, 125:19-128:5, 156:5-159:1. *See also*,

	StreamCast's Responses to 2(b) and 2(c) above. Finally, even if Plaintiffs' notice letters did satisfy *Napster's* notice requirement, they by necessity arrived after StreamCast's distribution of the Morpheus software, at a time when StreamCast had no ability to act upon the notices. Gribble Opp. Decl. ¶¶ 4, 13, 17, 20, 31.
(b) Plaintiffs notified Defendants on several occasions that copyrighted works listed in the Complaints, among many others, continued to be distributed on Defendants' systems after the filing of the Complaints. Creighton Decl. ¶ 19; Charlesworth Decl. ¶¶ 4-19 & Exs. A-P; Breen Decl. ¶¶ 5-10; Jacobsen Decl. ¶¶ 7-18.	DISPUTED. For the same reasons stated in StreamCast's Response to 3(a) above.
(c) After Napster was enjoined and ordered to block or "filter" infringing content from its system, MusicCity and an entity owned by the owners of Grokster operated "openNap" systems. Kleinrock Decl. ¶¶ 17-38; **Ex. 1** (Griffin Depo T.) 79:7-20, 117:16-24; **Ex. 2** (Smith Depo. T.) 25:20-26:5, 26:21-27:3, 27:19-32:2; **Ex. 3** (Weiss Depo. T.) 126:19-127:22; **Ex. 4** (Hardison Depo. T.) 50:17-51:9, 58:11-22, 69:18-70:20, 147:20-24; **Ex. 11**: MUS05070 [Hardison Depo. Ex. 120], MUS14394, 169135, 169022 [Smith Depo. Ex. 146], 171303 [Smith Depo. Ex. 145], 171327, 171405, 218607 [Hardison Depo. Ex. 116], 281520, 281525; **Ex. 14**: KVO00040-43 [Hardison Depo. Ex. 117] KVO00370-413 [Hardison Depo. Ex. 113], KVO000414-47 [Griffin Depo. Ex. 250].	DISPUTED IN PART. Plaintiffs' "description" of the evidence is misleading, because it implies that StreamCast did not being operating its "openNap' service until after the *Napster* decision was issued. To the contrary, StreamCast utilized "openNap" technology from January 2001 to April 2001. Smith Opp. Decl. ¶ 30. In fact, StreamCast ceased operating its "openNap" service shortly after the Ninth Circuit opinion in *Napster*. Smith Opp. Decl. ¶ 30; Lapple Decl. **Ex. 1** (Griffin Depo T.) 152:1-154:16. Regardless, this evidence is irrelevant, because the mere operation of an openNap service does not provide StreamCast with specific knowledge of infringing activity by users of the FastTrack and/or Gnutella versions of Morpheus. Furthermore, Plaintiffs have not charged StreamCast with liability in regard to its former operation of an openNap service.
(d) These openNap systems offered users infringing content, including music, motion pictures, and other copyrighted works. Creighton Decl. ¶¶ 7, 9; Ex. 14: KVO00062.	DISPUTED. Plaintiffs' evidence fails to establish, as a matter of law, that StreamCast's former openNap service offered users infringing content. Indeed, KVO00062 (the only non-self serving evidence cited by Plaintiffs) makes no

	mention of allegedly available infringing content on StreamCast's openNap service. Regardless, the evidence cited by Plaintiffs is irrelevant, because any awareness of possible infringing activity by virtue of StreamCast's prior involvement with openNap does not provide it with specific knowledge of infringing activity by users of the FastTrack and/or Gnutella versions of Morpheus. Furthermore, Plaintiffs have not charged StreamCast with liability in regard to its former operation of an openNap service.
(e) After accumulating a base of openNap users, MusicCity and Grokster then "migrated" those users (i.e., encouraged them to switch) to MusicCity's and Grokster's new systems based on the FastTrack technology developed by Kazaa. Kleinrock Decl. ¶ 31; **Ex. 1** (Griffin Depo. T.) 66:7-68:3, 148:9-149:1, 152:3-8, 166:20-167:3; **Ex. 2** (Smith Depo. T.) 40:21-41:9, 49:23-50:7, 77:8-	NOT DISPUTED. StreamCast does not deny that it attempted to migrate its openNap user base to Morpheus after adopting the FastTrack technology. However, this fact is immaterial, as it does not relate in any way to whether or not StreamCast has specific knowledge of infringing conduct by a particular Morpheus user. In addition, there is nothing

11, 80:2-6; **Ex. 3** (Weiss Depo. T.) 89:23-91:6, 98:8-99:3; **Ex. 4** (Hardison Depo. T.) 55:5-59:20, 87:1-25,122:8-21, 170:17-171:3; **Ex. 8** (Kallman Depo. T.) 78:19-79:1; **Ex. 11** (MUS014521, 142595 [Griffin Depo. Ex. 311], 150322 [Griffin Depo. Ex. 262], 171589 [Griffin Depo. Ex. 253], 172786, 174571, 544383 [Smith Depo. Ex. 149], 543791 [Griffin Depo. Ex. 246]; **Ex. 15** T000082-84 [Weiss Depo. Ex. 26], T001083-85.	unlawful about attempting to convince users of the Napster service, which was not held to be per se illegal in the *Napster* decision, to use a legitimate P2P software program (i.e., Morpheus).
(f) After adopting the FastTrack technology for their system, MusicCity and Grokster publicly compared themselves to Napster or otherwise sought to and capitalize on Napster's notoriety. Gorkster placed the term "Napster" in the "meta-tags" for its website. **Ex. 11:** 129399, 35858 [Griffin Depo. Ex. 384], 420416, 543811.	DISPUTED. Once again, Plaintiffs' "description" of the evidence is misleading. The evidence cited by Plaintiffs does not show that StreamCast "publicly compared" itself to Napster after adopting the FastTrack version of Morpheus. Rather, the evidence cited by Plaintiffs shows, at most, that an *internal* StreamCast

	media kit contained links to various news articles (written by third-party news agencies), some of which compared Morpheus to Napster. There is simply no evidence to show that this internal media kit was ever distributed to anyone other than StreamCast employees. Moreover, the allegation that StreamCast has publicly compared Morpheus to Napster is simply untrue. StreamCast has consistently attempted to differentiate itself from Napster to the public. Lapple Decl. **Ex. 1** (Griffin Depo. T.) 438:18-441:8; Plaintiffs' Ex. 11: 141685(p.986), 150543, 2806f97, 280699. Finally, even if there was sufficient evidence to show that StreamCast publicly compared Morpheus to Napster, such evidence is wholly irrelevant to the question of whether StreamCast had specific knowledge of infringing activity by any particular Morpheus user.
(g) In 2002, after the Napster-like service AudioGalaxy announced (in response to a lawsuit by copyright owners) that it would begin blocking infringing music from its service, Grokster offered a free "migration tool" to attract AudioGalaxy users to switch to the Grokster service. Shock Decl. ¶ 7 & Ex. 5.	Because this fact relates solely to Defendant Grokster, StreamCast does not have sufficient information to dispute or not dispute this fact.
(h) After adopting the FastTrack technology, MusicCity's computers captured data from its system confirming that users were searching for the copyrighted music of top-selling artists, including Eminem, Madonna, Metallica, Janet Jackson, Stained, Jennifer Lopez, Limp Bizkit, and others. **Ex. 11:** 250095, 282782-282784, 261564- 261566.	DISPUTED. Plaintiffs dramatically misrepresent the meaning of the evidence cited. The exhibits cited are server logs from StreamCast's Internet web server. These logs show that persons using the Internet browser portion of Morpheus attempted to input the names of artists into the *navigation* URL field of the Internet browser, instead of the Morpheus "Search Page" (which relates to the P2P functions of Morpheus). Due to an error in the HTML code of the early versions of Morpheus (1.2), this information was sent from the Morpheus client's Internet browser to the StreamCast servers. The StreamCast servers did not

	recognize these search terms as valid HTTP instructions, and therefore ignored them. What should have happened, and what did happen after this bug was fixed, was that if a user entered a search term in the web browser portion of the Morpheus client, this search term was "forwarded" to the embedded KazaaLib software, so that a search could be performed. When this was fixed, no search terms were sent back to any StreamCast server. In any event, none of the search terms that were sent back to StreamCast servers as a result of this bug were ever looked at by anyone at StreamCast, because StreamCast knew that they were an error. Therefore, Plaintiffs' assertion that StreamCast "captured data confirming that users were searching for copyrighted material," badly misinterprets this evidence and, to the extent that Plaintiffs try to ascribe knowledge or intent to StreamCast, this evidence fails completely. Smith Opp.

	Decl. ¶ 96.
(i) MusicCity tested its system by searching for copyrighted music. **Ex. 1** (Griffin Depo. T.) 158:12-162:14; **Ex. 11:** 169313, 172262 [Griffin Depo. Ex. 260], 545198.	NOT DISPUTED. StreamCast does not deny that Mr. Griffin tested the FastTrack version of Morpheus by running a search for music by Garth Brooks. At most, the search performed by Mr. Griffin revealed that files allegedly containing music by Garth Brooks were available at that time in a shared folder on a computer then-connected to the FastTrack network. This evidence, however, does not prove: (1) that the files discovered by Mr. Griffin actually contained Garth Brooks music (i.e., they were what they purpcrted to be), (2) that the files were being made available for download by a Morpheus user ()the files could have been made available by a Kazaa or Grokster user), or (3) that Mr. Griffin had actual knowledge of a specific Morpheus user offering such files for download, or (4) that Mr. Griffin or StreamCast had any ability to control such activity at the time the

	potentially infringing content was discovered. Accordingly, this evidence fails to satisfy *Napster's* requirement of specific knowledge. Moreover, this evidence is completely irrelevant for purposes of the Gnutella-based versions of Morpheus.
(j) Users have often discussed their reproduction and/or distribution of copyrighted works on Defendants' message boards and chat rooms (which Defendants monitored) and in e-mail messages to Defendants. [Plaintiffs' citations to evidence omitted].	NOT DISPUTED. StreamCast does not deny that some of its Morpheus users discussed the availability of allegedly copyrighted material on StreamCast's message boards and chat rooms (when such discussion forums existed). However, these discussions did not give StreamCast any specific knowledge of infringing activity by a particular Morpheus user. The user names employed or associated with discussions on StreamCast's message boards and chat rooms had no relationship to the user names used in connection with the searching and file-sharing functions of Morpheus. Smith Opp. Decl.

	¶ 66. Therefore, StreamCast had no way of knowing the true identity of a user when he or she discussed the reproduction and/or distribution of allegedly infringing content on StreamCast's message boards. Smith Opp. Decl. ¶¶ 66. Moreover, hearsay evidence of third parties' discussions relating to Morpheus or allegedly copyrighted content is not competent summary judgment evidence of the existence of specific copyrighted content.
(k) Defendants' own officers, directors, and employees have used their systems to search for and download copyright works. **Ex. 1** (Griffin Depo. T.) 158:12- 162:14; **Ex. 3** (Weiss Depo. T.) 216:10-19:23, 229:12-30:20; **Ex. 9** (Tung Depo. T.) 75:13-77:25; **Ex. 11:** 143058, 143771, 167007, 172262 [Griffin Depo. Ex. 260], 173503, 436988, 438121, 545447.	DISPUTED IN PART. StreamCast does not dispute that Mr. Griffin searched the FastTrack network for music by Garth Brooks. However, Mr. Griffin never downloaded the files allegedly containing Garth Brooks music, nor did he download any other types of media files. Plaintiffs' Ex. 1 (Griffin Depo. T.) 158:12-162:14. Regardless, this evidence does not prove that Mr. Griffin or StreamCast had specific knowledge of

	infringing activity by a particular Morpheus user for the same reasons stated in response to subsection 3(i) above. In addition, StreamCast does not deny that its former CEO (Michael Weiss) downloaded a handful of sound recordings to be used at a private party at his house. However, Mr. Weiss' deposition testimony reveals that the music he downloaded was music he already possessed in his CD collection. Lapple Decl. **Ex. 3** (Weiss Depo. T.) 230:21-231:22. At most, this evidence goes to StreamCast's alleged constructive knowledge and fails to prove, as a matter of law, that Mr. Weiss or StreamCast had any specific knowledge of direct infringement by a particular Morpheus user in regard to the copyrighted works at issue in this case.
(l) Defendants promoted their systems with materials featuring examples of infringing files. **Ex. 1** (Griffin Depo. T.) 317:9-321:4, 433:22-443:6; **Ex. 11** MUS007980-83, 35858 [Griffin Depo. Ex. 384], 17374, 33782 [Griffin Depo. Ex. 300], 150697 [Griffin Depo. Ex. 387], 435926, 436042, 436403, 436409; **Ex. 63** (Griffin Depo. Ex. 386); **Ex. 64** (Griffin Depo. Ex. 388); **Ex. 65** (Griffin Depo. Ex. 389).	DISPUTED. None of the evidence cited by Plaintiffs shows that StreamCast publicly "promoted" itself or Morpheus with materials featuring examples of allegedly infringing files. Rather, the evidence cited by Plaintiffs amounts to *internal* StreamCast documents, some of which discuss the alleged availability of infringing content on the FastTrack network. This evidence, however, does not show that StreamCast has the specific knowledge of direct infringement required to be held liable for contributory infringement.

(m) Kazaa sent technical documents to MusicCity that demonstrated operation of the FastTrack technology with examples showing searches for and downloading of infringing works. **Ex. 1** (Griffin Depo. T.) 302:3-308:10; **Ex. 11** 148613 [Griffin Depo. Ex. 297], 173643, 545198, 1515017 [Griffin Depo. Ex. 296], 2109103 [Griffin Depo. Ex. 303].	NOT DISPUTED. At most, the examples contained in the technical manual provided to StreamCast by Kazaa showed that files containing potentially copyrighted material were available in a shared folder on a computer then-connected to the FastTrack Network. This evidence however, does not provide StreamCast with any specific knowledge of infringing activity by a particular Morpheus user.
(n) MusicCity developed promotional materials featuring infringing content,	DISPUTED. The evidence cited by Plaintiffs is not "promotional material," was

and then blurred the titles of such content in an attempt to avoid liability. **Ex. 2** (Smith Depo. T.) 542:16-543:3; **Ex. 11** 169490 [Smith Depo Ex. 233], 169502 [Smith Depo. Ex. 232].	not "developed" by StreamCast, does not "feature infringing content," and was not "blurred . . . in an attempt to avoid liability." Rather, the evidence cited by Plaintiffs was an *internal* document "developed" by an independent contractor working for StreamCast, and was not "developed" at the request or direction of StreamCast. Smith Opp. Decl. ¶ 92. Moreover, the evidence cited does not reveal "infringing content." Rather, the evidence shows that certain files purporting to be music files (that may or may not be copyrighted) were possibly available in a shared folder on a computer then-connected to the FastTrack Network. Finally, StreamCast has no idea why the independent contractor "blurred" titles of the content. Smith Opp. Decl. ¶ 92
(o) MusicCity's and Grokster's executives are sophisticated in intellectual property matters and have experience in the recording	NOT DISPUTED. However, this evidence is irrelevant and immaterial. The fact that StreamCast executives may be generally aware of

industry or other industries that are based on copyrighted content. **Ex. 1** (Griffin Depo. T.) 11:14-12:8, 13:2-8, 15:13-16:7, 17:23-18:9, 22:18-24; **Ex. 2** (Smith Depo. T.) 186:17-187:9, 360:24-361:1, 361:21-362:1; **Ex. 3** (Weiss Depo. T.) 32:10-17, 32:25-33:17, 33:18-34:24, 36:16-37:16, 37:17-39:8, 39:11-40:25, 384:11-386:8; **Ex. 11** 164071 [Smith Dep. Ex. 202], 169859, 171596, 261436 [Griffin Depo. Ex. 242], 280199, 545010, 1536322.	intellectual property matters and have had prior experience in the recording industry does not provide them with any specific knowledge of infringing activity by a particular Morpheus user. Accordingly, the evidence cited by Plaintiffs is irrelevant and does not support summary judgment against StreamCast.
(p) MusicCity and Grokster have responded to user emails or message board postings , and have given users specific advise on how to download copyrighted content more effectively. **Ex. 11** 136716 [Griffin Depo. Ex. 313], 136945 [Griffin Depo. Ex. 315], 136947 [Griffin Depo. Ex. 316], 137081 [Griffin Depo. Ex. 317], 137920, 137925 [Griffin Dep. Ex. 320], 142595 [Griffin Depo. Ex. 311], 143398 [Griffin Depo. Ex. 319], 143427 [Griffin Depo. Ex. 318], 144169.	DISPUTED. StreamCast has never given "advice" on "how to download copyrighted content more effectively." Indeed, the evidence cited by Plaintiffs does not support this claim. Rather, the evidence cited by Plaintiffs shows that StreamCast responded to general questions regarding how to use the Morpheus product to play (or obtain the appropriate software to play) media files that the user already had on his or her computer. It is undisputed that users can use their

	Morpheus media player to play any content which they have copied onto their computers, including noninfringing content copied from the Internet or directly from the user's own media collection. Smith Opp. Decl. ¶ 57.
(q) Music City approached some record companies for licenses, only to abandon the effort after it determined that licenses would be too expensive. **Ex. 1** (Griffin Depo. T.) 273:15-74:15; **Ex. 3** (Weiss Depo. T.) 288:5-91:22; **Ex. 11**, MUS12569 [Griffin Depo. Ex. 290].	DISPUTED IN PART. StreamCast does not dispute that it approached some record companies for licenses when it attempted to start a streaming internet radio platform in late 1999. However, this evidence is irrelevant and does not prove that StreamCast had any specific knowledge of infringing activity by users of the FastTrack and Gnutella versions of Morpheus. Moreover, this evidence does not establish that StreamCast needed to obtain licenses from any content owner in order to distribute its Morpheus P2P software product.
(r) Defendants have discussed paying copyright owners when their works are	ADMITTED. StreamCast does not deny that it discussed obtaining licenses

distributed over Defendants' systems. **Ex. 1** (Griffin Depo. T.) 103:12-104:25, 119:9-122:9; **Ex. 3** (Weiss Depo. T.) 75:22-78:3, 103:2-104:1, 291:14-17, 326:21-327:3, 568:1-570:11; **Ex. 4** (Hardison Depo. T.) 150:22-151:11; **Ex. 11**, MUS 005691-96, 1503465; **Ex. 15**, T000087-90 [Weiss Depo. Ex. 21].	and paying copyright owners when it was considering an internet streaming radio platform. However, this evidence is irrelevant, as it fails to show that StreamCast has specific knowledge of infringing activity by Morpheus users. Moreover, this evidence does not establish that StreamCast needed to obtain licenses from any content owner in order to distribute its Morpheus P2P software product.
(s) Defendants protect their own intellectual property. Shock Decl. ¶¶ 6-7 & Exs. 6-7; **Ex. 1** (Griffin Depo. T.) 116:13-117:7, 200:22-201:13, 337:19-22; **Ex. 11** MUS14397, 150609, 161624, 172692, 543714; **Ex. 62** (Griffin Depo. Ex. 271).	NOT DISPUTED. However, this evidence is irrelevant, as it fails to show that StreamCast has any specific knowledge of infringing activity by Morpheus users.
(t) Defendants have received and are aware of media reports discussing the pervasive copyright infringement that takes place on their systems. **Ex. 1** (Griffin Depo. T.) 278:5-10, 433:22-43:6; **Ex. 3** (Weiss	DISPUTED IN PART. StreamCast does not deny that some of its executives are aware of media reports discussing how the FastTrack network operates, and that users on the FastTrack network, in general, may be

Depo. T.) 455:8-56:7; **Ex. 11** 150697 [Griffin Depo. Ex. 387], 25858 [Griffin Depo. Ex. 384], 1568992 [Griffin Depo. Ex. 291]; **Ex. 63** (Griffin Depo. Ex. 386); **Ex. 64** (Griffin Depo. Ex. 388); **Ex. 65** (Griffin Depo. Ex. 389).	offering copyrighted content available for downloading. However, this evidence is irrelevant because it fails to show that StreamCast has any specific knowledge of infringing activity by a particular Morpheus user.

Plaintiffs' Alleged Uncontroverted Fact No. 4:

Defendants materially contribute to their users' acts of direct copyright infringement.

StreamCast's Response to Plaintiffs' Alleged Uncontroverted Fact No. 4:

DISPUTED. StreamCast disputes that it "materially" contributes to Morpheus users' acts of direct copyright infringement. First, StreamCast provides software, which individuals may download and use. However, as explained throughout this document, StreamCast does not control the searches that users of its software run, does not control whether users of its software choose to make copyrighted content available for downloading, and does not control whether users of its software download copyrighted content, with or without permission. Moreover, StreamCast's participation in any alleged copyright infringement is not "substantial." Finally, any incidental "services" provided by StreamCast do not participate in or assist any infringing activity.

PLAINTIFFS' EVIDENCE	**STREAMCAST'S RESPONSE**
(a) Defendants have provided	DISPUTED. StreamCast

their users, free of charge by way of online download, with the proprietary software that is required to access Defendants' systems. Kleinrock Decl. ¶¶ 24, 33; **Ex. 11**, C 438220, 167428, 174571, 543792, 545010; **Ex. 22** (Answer and Counterclaim of Defendant Kazaa BV).	provides software, and has allowed other websites to provide its software, that users can download for free. StreamCast's software can then be used by its users to create a user defined network. However, StreamCast does not in any way own, operate, or control a "system." *Morpheus-FastTrack* DISPUTED. StreamCast licensed the FastTrack software from Defendant Consumer Empowerment B.V., which subsequently became known as "Kazaa". (All references hereafter to Kazaa shall refer collectively to both Consumer Empowerment B.V. and Kazaa). Kazaa has maintained the Fast Track source code as proprietary. Smith Opp. Decl. ¶ 14. Therefore, StreamCast disputes any implication that any of the FastTrack versions of Morpheus were "proprietary" in the sense that StreamCast had ownership or control of the software licensed from

	Kazaa. *Morpheus-Gnutella* DISPUTED IN PART. Morpheus Preview Edition and Morpheus 1.9 are based on P2P technology which is licensed from Gnucleaus, an open-source software developer. Morpheus 2.0 is based on P2P technology which is licensed from Jtella, also an open-source developer. Although portions of the Gnutella-based versions of Morpheus do contain some proprietary StreamCast software (related to the client interface and other functions), such portions do not relate to the file sharing functions of Morpheus. Smith Opp. Decl. ¶ 93.
(b) Defendants' systems enable, andprovide an infrastructure for, users to search for, reproduce and distribute copyrighted sound recordings, motion pictures and other types of works without the authorization of the copyright owner. **Ex. 1** (Griffin Depo. T.) 361:15-366:25; **Ex. 2** (Smith Depo. T.) 475:6-476:21; 490:13-491:25; 500:13-512:15; 515:8-516:18; 524:24-525:7; 527:12-528:18; 529:1-25; **Ex. 11** 136947 [Griffin Depo Ex. 316]; 137081.1; 136716; 137925 [Griffin Depo Ex. 320]; 137925.1; 144169; 167428; 543791; 545010.	DISPUTED. StreamCast distributessoftware which allows a user of that software to connect to and interact with other users of the software. StreamCast acknowledges that if a user of this software makes a file available for download that contains copyrighted material, it is possible that the file containing copyrighted material would be distributed without the authorization of the copyright owner. However, StreamCast does not operate a "system" and does not "provide an infrastructure for" the distribution of anything. Smith Opp. Decl. ¶ 34. The "infrastructure" of the FastTrack and Gnutella networks are the same as that of the Internet itself, which is not owned or controlled by StreamCast. StreamCast also notes that, contrary to the Plaintiffs' implication, all versions of StreamCast's software can be used to search for, download and share material that is in the public domain (as acknowledged by Plaintiffs' own expert). Lapple Decl. **Ex. 6** (Kleinrock Depo. T.) 125:107.
(c) Defendants have provided their users with upgrades and updates of their proprietary software, free of charge, to add features to enhance the user experience. Kleinrock	DISPUTED IN PART. Like almost every other software vendor, StreamCast occasionally makes updates for its software available to its users for download.

Decl. ¶¶ 26, 27, 30, 37(a), 39, 40, 42, 45, 46, 50, 55; **Ex. 2** (Smith Depo. T.) 107:3-14; 108:11-19; 147:3-19; 149:11-150:22; 152:14-153:12; 222:2-22; 225:9-22; 400:3-415:22; 475:6-476:21; 490:13-491:25; 500:13-512:15; 515:8-516:18; 525:24-525:7; 527:12-528:18; 529:1-25; **Ex. 3** (Weiss Depo. T.) 573:11-574:7; **Ex. 5** (D. Rung Depo. T.) 107:17-109:1; 236:17-239:19; **Ex. 11**, MUS013119-20; 168207 [Smith Depo. Ex. 156]; 168283 [Smith Dep. Ex. 171]; 1628486; **Ex. 15**, T000139.	StreamCast does this free of charge. However, StreamCast does not force Morpheus users to upgrade. This is evidenced by the fact that many versions of Morpheus 1.2, 1.3, Preview Edition and Morpheus 1.9 are still in use and able to create P2P networks, even though StreamCast has made a more recent version, Morpheus 2.0, available for download. Smith Opp. Decl. ¶ 39. *Morpheus-FastTrack* DISPUTED. StreamCast licensed the P2P functionality of the FastTrack versions of Morpheus from Kazaa. Therefore, StreamCast did not have any ownership or control over the source code for the FastTrack software and did not have the ability to provide an update for the same. Smith Opp. Decl. ¶ 40. *Morpheus-Gnutella* DISPUTED IN PART. The P2P functionality of the Gnutella-based versions of

	Morpheus are based entirely on "open source" code and are not proprietary to StreamCast. Smith Opp. Decl. ¶ 43.
(d) Defendants have (at various points) operated from their own central servers server-side programs to handle user registration and login functions. Kleinrock Decl. ¶¶ 33, 34, 49, 60; **Ex. 2** (Smith Depo. T.) 97:10-14; 98:25-99:8; 99:23-100:0; 103:16-104:3; 106:9-20; 119:16-120:23; **Ex. 11**, MUS439257; 168144 [Smith Depo. Ex. 152]; 535703; 544749; 544558; 1636155; 1637092; **Ex. 19** (Answer of Defendant MusicCity to *MGM* Plaintiffs' First Amended Complaint ¶ 75); **Ex. 23** (Response of MusicCity Defendants to *MGM* Plaintiffs' First Set of Interrogatories, Response to Interrogatory No. 21).	*Morpheus-FastTrack* DISPUTED IN PART. StreamCast does not deny that from April 2001 until February 2002, it operated a "kazaaserver," which ran server-side software written by Kazaa and handled user registration and login functions. However, StreamCast did not have access to the source code or the server-side software. Smith Opp. Decl. ¶ 22. Moreover, the registration and log in functions did not perform any critical functions with respect to a user's ability to search for and/or download files on the FastTrack user network. Smith Opp. Decl. ¶ 22. In fact, on approximately 40 occasions, StreamCast's kazaaserver failed and was inaccessible. Nevertheless, users of the FastTrack versions of Morpheus were

	still able to operate Morpheus during these kazaaserver failures. Smith Opp. Decl. ¶ 23. *Morpheus-Gnutella* DISPUTED. StreamCast does not operate any server-side programs to handle user registration or log in functions for any of the Gnutella-based versions of Morpheus. Because the Gnutella user network is not compatible with usernames or passwords, there is no user registration or log in function necessary for the P2P functionality of this software. Smith Opp. Decl. ¶ 43.
(e) Defendants have (at various points) affects and/or improved the performance, security and/or functioning of their systems or client applications centrally, by modifying variables in programs running on their central servers. Kleinrock Decl. ¶¶ 37(a), 49(a)-(b); **Ex. 1** (Griffin Depo. T.) 252:3-10; **Ex. 2** (Smith Depo. T.) 112:14-113:25; 106:14-107:14; 168:5-21; 168:24-	*Morpheus-FastTrack* DISPUTED. StreamCast had no ability to affect or improve the performance of the FastTrack user network. Smith Opp. Decl. ¶ 10. Although StreamCast did have the ability to change encryptions and protocols for the FastTrack versions of Morpheus, it had no affect on the performance, security, or functioning of the FastTrack

170:13; 190:10-16; 190-17-20; 191:1-19; 192:6-193:22; 195:2-23; 196:10-19; 197:18-198:3; 196:23-198:5; 199:10-23; 195:2-23; 196:23-198:5; 199:10-23; 254:7-17; 291:16-24; 298:15-299:12; 3 15:2-25; 318:2-320:15; 334:12-335:8; 336:20-337:19; 395:20-396:1; 397:18-22; 399:7-11; 413:14-414:17; 416:17-417:5; 514:12-14; 514:19-515:5; 517:5-520:7; 521:20-523:19; 524:22-24; **Ex. 11,** 164278; 164299; 168257 [Smith Depo Ex. 163]; 176100; 176153; 265960.1 at .17; 436033; 436095 [Smith Depo. Ex. 196]; 437346; 544568; 544964 [Smith Depo. Ex. 160]; 545105 [Smith Depo. Ex. 164]; 545901 [Smith Depo. Ex. 192]; 1532155 [Griffin Depo Ex. 286]; 1536222 [Smith Depo. Ex. 213]; **Ex. 15,** T00025; **Ex. 67** (Smith Depo. Ex 225).	user network. Smith Opp. Decl. ¶¶ 10-12. Moreover, use of encryption does not protect or ensure the anonymity of a Morpheus user, it simply provides a way to prevent hackers from interfering with communications between Morpheus clients. Smith Opp. Decl. ¶¶ 50-53. *Morpheus-Gnutella* StreamCast has no ability to tune or alter the operation of Morpheus Preview Edition or Morpheus 1.9. Smith Opp. Decl. ¶ 94. StreamCast does have a very limited ability to alter the PCP protocol on Morpheus 2.0. This protocol is used during the distribution of updates, primarily bug patches, which spread the burden of serving updates across Morpheus peers, in addition to StreamCast servers. However, this PCP protocol has no effect on the ability of a user to download files or offer files for sharing. Smith Opp. Decl. ¶ 94.
(f) Defendants have (at	*Morpheus-FastTrack*

various points) engaged in regular communication with client applications from their central servers for the purpose of communicating to client applications that an updated version of the client application was available. Kleinrock Decl. ¶¶ 37(a), 43(f), 50; **Ex. 2** (Smith Depo. T.) 107:3-14; 108:11-19; 152:14-153:12; 515:8-516:18; **Ex. 5** (D. Rung Depo. T.) 236:17-239:19; 242:1-12; **Ex. 11** 120647.1-120647.2; 168207; 265960.1 at 265960.17; 438220; 438220, attachment page 1.	DISPUTED. StreamCast does not dispute that each time a user launched a FastTrack version of Morpheus, Morpheus would contact the kazaaserver and determine whether an updated version of Morpheus was available. If an updated version of Morpheus was available, the kazaaserver would then send a notification message to the user, informing the user that a newer version of Morpheus was available for download. The user then had the option of upgrading the software. Smith Opp. Decl. ¶ 85. This process of sending update notifications was an automated process not unlike the automated process carried out by many other software vendors, such as virus protection software venders. Smith Opp. Decl. ¶ 85. StreamCast disputes that these automated update notifications constitute a "regular communication" with the Morpheus users. *Morpheus-Gnutella* DISPUTED IN PART.

	Morpheus Preview Edition and Morpheus 1.9 do not provide update notifications. Smith Opp. Decl. ¶ 38. Morpheus 2.0 does provide an update notification, which a user may voluntarily accept or reject. Smith Opp. Decl. ¶¶ 41-42.
(g) Defendants have (at various points) engaged in regular communication with supernodes (up to every 12 hours) for the purpose of causing supernodes to cease operating as supernodes if they are not running the latest version of the client application. Kleinrock Decl. ¶ 51; **Ex. 2** (Smith Depo. T.) 253:9-254:23; 260:10-261:4; **Ex. 11**, 168312.	*Morpheus-FastTrack* DISPUTED. StreamCast has never had the ability to communicate with any supernode for any purpose, much less to cause them to cease operating if they are not running the latest version of the client application. Smith Opp. Decl. ¶¶ 7-8. StreamCast notes that the deposition testimony of Darrell Smith cited by Plaintiffs refers to actions apparently taken by Kazaa, not by StreamCast. *Morpheus-Gnutella* DISPUTED. This alleged fact is inapplicable for the Gnutella versions of Morpheus, because they do not utilize supernodes. Smith Opp. Decl. ¶ 43.

(h) Defendants have (at various points) operated from their own central servers specialized supernodes, known as "root" or "seed server" supernodes that provided supernode IP addresses to client applications to enable or facilitate users' connection to their systems. Kleinrock Decl. ¶¶ 37(b), 48; **Ex. 2** (Smith Depo. T.) 122:15-123:17; 125:13-24; 128:8-18; 167:22-168:4; 342:5-16; 368:24-369:10; 370:17-372:1; 375:8-21 381:12-382:17; 383:8-385:9; 412:13-25; **Ex. 11**, 164071 [Smith Depo. Ex. 202] 168144 [Smith Depo. Ex. 152]; 168154; 168217 [Smith Depo. Ex. 159]; 168335; 2108171 and attachment, 436159 [Smith Depo. Ex. 205]; 2108171 (and attachment); **Ex. 23** (Response of MusicCity Defendants to *MGM* Plaintiffs' First Set of Interrogatories, Response to Interrogatory No. 21.	*Morpheus-FastTrack* DISPUTED. A "root supernode" is a computer which maintains and provides the IP address of regular supernodes which are likely to be active. Smith Opp. Decl. ¶ 15. In this way, a root supernode functions similar to a host cache on the Gnutella user network, maintaining a list of IP addresses of regular supernodes which it supplies to any client requesting such a list, thereby allowing the client to "boot strap," or find an active supernode. Gribble Opp. Decl. ¶ 36(c); Smith Opp. Decl. ¶ 15; Lapple Decl. **Ex. 2** (Smith Depo. T.) 122:15-18. StreamCast operated a single root supernode from approximately April 19, 2001 until approximately one to two months later, or until between May 15 and June 15, 2001. Lapple Decl. **Ex. 2** (Smith Depo. T.) 371:5-372:8; 377:16-378:2. Smith Opp. Decl. ¶¶ 16-18. After this brief period, StreamCast ceased operating a root

	supernode when the server operating the root supernode crashed and because Kazaa redesigned the software in a new version, Morpheus 1.3, Lapple Decl. **Ex. 2** (Smith Depo. T.) 375:13-18. Morpheus 1.3 included a list of predetermined IP addresses of regular supernodes within the software code (controlled by Kazaa), which enabled each Morpheus 1.3 user to locate a regular supernode without contacting a root supernode, making the boot strapping function of the root supernode superfluous. Lapple Decl. **Ex. 2** (Smith Depo. T.) 362:7-363:3; [Smith Depo. Ex. 198]. Morpheus version 1.2 did not include embedded IP addresses. Lapple Decl. **Ex. 2** (Smith Depo. T.) 376:11-25; Smith Opp. Decl. ¶ 20. The embedded IP addresses were chosen by Kazaa. StreamCast has never had access to the software code which performed the file sharing functions of Morpheus 1.3 and therefore did not provide the IP

	addresses included in the download of the Morpheus software. Smith Opp. Decl. ¶ 21. StreamCast's operation of a root supernode did not control a Morpheus user's ability to connect to other computers on the FastTrack user network. Instead, StreamCast's root supernode operated only as a "backup" in case Morpheus clients could not connect to one another on their own, in which case the root supernode would supply IP addresses of potentially operative regular supernodes. Smith Opp. Decl. ¶ 19; Lapple Decl. **Ex. 2** (Smith Depo. T.) 122:15-124:7. StreamCast did not operate a root supernode again until approximately October 3, 2001, when Kazaa provided an updated version of the root supernode software to StreamCast. However, StreamCast is not aware of whether the new root supernode provided by Kazaa ever actually worked. Lapple Decl. **Ex. 2** (Smith Depo. T.) 384:24-385:18. Smith Opp. Decl. ¶ 18.

	Regardless, the new root supernode begun in October ceased operation no later than December 2001. Smith Opp. Decl. ¶ 18. Furthermore, Mr. Smith testified that he believes StreamCast's root supernode was never used by any Morpheus clients to bootstrap onto the FastTrack user network. Lapple Decl. **Ex. 2** (Smith Depo. T.) 124:11-125:12. *Morpheus-Gnutella* DISPUTED. This alleged fact is inapplicable to each of the Gnutella-based versions of Morpheus, as they do not utilize any root supernodes or seed server supernodes. Smith Opp. Decl. ¶ 43.
(i) Defendants have selected and embedded the Internet addresses of multiple supernodes in the client software provided to users, and have periodically updated this list of supernode addresses, to enable or facilitate users' connection to their systems. Kleinrock Decl. ¶¶ 37(b), 48; **Ex. 2**	*Morpheus-FastTrack* DISPUTED. StreamCast has never selected or imbedded any Internet addresses of any supernodes in client software provided to users. StreamCast also has never updated any list of supernode addresses in any of the FastTrack versions of Morpheus. This was done, if

(Smith Depo. T.) 104:4-16; 247:23-248:22; 249:5-250:18; 342:5-16; 365:24-367:10; 368:24-369:10; 370:17-372:1; 375:13-376:10; 412:13-25; **Ex. 11**, 168236; 172758 [Smith Depo. Ex. 174].	at all, by Defendant Kazaa, and was not at the request or under the control of StreamCast. Smith Opp. Decl. ¶ 21. The deposition testimony cited by Plaintiffs of Darrell Smith makes it clear that these actions were taken by Kazaa, not StreamCast.

Plaintiffs' Alleged Uncontroverted Fact No. 6:

Defendants have the right and/or ability to supervise and/or control the infringing activities of users on their systems.

StreamCast's Response to Plaintiffs' Alleged Uncontroverted Fact No. 6:

DISPUTED. StreamCast does not possess the right and/or ability to supervise and/or control the alleged infringing activities of users of the Morpheus software. As detailed in the specific responses below, under the "current architecture" of the Morpheus software product, StreamCast has no effective method of preventing Morpheus users from committing the acts alleged to be copyright infringement by Plaintiffs.

PLAINTIFFS' EVIDENCE	**STREAMCAST'S RESPONSE**
(a) Defendants have the ability to, and do, modify and change the features, functionality and security of the proprietary client	*Morpheus-FastTrack* DISPUTED. StreamCast did not utilize a "digital key." StreamCast never had access

application they distribute to users to allow them to access and use the systems. Because the client applications will only accept upgrades presented with defendants' "digital key," only defendants' upgraded client versions will be accepted by the system. Kleinrock Decl. ¶¶ 46, 49-50, 52, 53, 55, 58; **Ex. 1** (Griffin Depo. T.) 252:3-10; **Ex. 2** (Smith Depo. T.) 97:7-99:8, 1.15:15-116:20, 112:14-113:25, 147:3-19, 149:11-150:22, 151:12-152:4, 154:25-155:12, 156:23-158:8, 159:8-160:20, 168:5-21, 168:24-170:13, 190:10-16, 190:17-20, 191:1-19, 192:6-193:22, 195:2-23, 196:10-19, 197:18-198:3, 196:23-198:5, 199:10-23, 195:2-23, 196:23-198:5, 199:10-23, 222:2-22, 225:9-22; 227:23-228:17, 234:1-235:23, 236:12-237:24, 254:7-17291:8-294:9, 297:2-299:19, 314:2-25, 317:2-320:14; 333:12-334:8; 335:9-336:19; 348:7-355:22; 359:4-24; 361:2-362:1; 379:3-381:20; 394:20-395:1; 396:18-22; 398:7-11; 412:14-413:17; 415:17-416:5; 5 13:12-14; 513:19-514:5;	to the software code which performed the file sharing functions of the FastTrack-based versions of Morpheus. StreamCast licensed the peer-to-peer functionality of these versions of Morpheus from Kazaa, which retained control over the software code. KZ000723-42. Any "digital key" which existed within the software product licensed to StreamCast by Kazaa was not within StreamCast's ability to modify or change. Smith Opp. Decl. ¶¶ 35-37. Plaintiffs' expert, Professor Kleinrock, admits that "Kazaa alone," and not StreamCast, held the "digital keys" with which to "digitally sign" the client program. Lapple Decl. **Ex. 6** (Klienrock Depo. T.) 102:13-20. Professor Klienrock also admits that StreamCast could not change programming code or the functionality of the Morpheus client "without going through Kazaa or BlueMoon." Lapple Decl. **Ex. 6** (Kleinrock Depo. T.) 114:5-10. Although StreamCast did have the

516:5-519:7; 520:20-522:19; 523:22-24; **Ex. 3** (Weiss Depo. T.) 573:11-574:7; **Ex. 11**, MUS013119-20, 137081, 164278, 164299, 168216, 168257 [Smith Depo Ex. 163], 168283 [Smith Depo. Ex. 171], 176153, 1628486, 436095, 436159, 437346, 544965 [Smith Depo. Ex. 160], 265960.17; 438220 (attach. p. 1), 544409 [Smith Depo. Ex. 152], 168207 [Smith Depo. Ex. 156], 168216 [Smith Depo. Ex. 157], 168257 [Smith Depo. Ex. 163], 176100 [Smith Depo. Ex. 164], 545568 [Smith Depo. Ex. 167], 168295 [Smith Depo. Ex. 172], 172881 [Smith Depo. Ex. 188], 436033 [Smith Depo. Ex. 189], 545901 [Smith Depo. Ex. 192], 436095 [Smith Depo. Ex. 196], 176153 [Smith Depo. Ex. 198], 164278 [Smith Depo. Ex. 199], 164299 [Smith Depo. Ex. 200], 437346 [Smith Depo. Ex. 201], 175627 [Smith Depo. Ex. 203], 175677 [Smith Depo. Ex. 204], 1536222 [Smith Depo. Ex. 213], 1532155 [Griffin Depo. Ex.	ability to modify a file on a server which it owned (the "kazaaserver"), this would have had a limited effect on the functionality of these versions of Morpheus (as described more fully in StreamCast's Response to 6(f) below). The testimony and exhibits cited by Plaintiffs plainly show that StreamCast did not have the ability to modify or change the features, functionality, and security of the file sharing function of the FastTrack-based versions of Morpheus. Indeed, the testimony of Mr. Griffin shows that StreamCast lacked the ability to upgrade the Morpheus software or to control any computer connected to the FastTrack user network. Plaintiffs' Ex. 1 (Griffin Depo. T.) 252:3-10. Similarly, the testimony of Mr. Smith shows that StreamCast did not have the ability to, and did not, modify or change the features, functionality, and security of the Morpheus software. Specifically, this testimony shows only that

286]; **Ex. 15**, T000025-26 [Weiss Depo. Ex. 22], T000139; **Ex. 67** (Smith Depo. Ex. 225).	Kazaa or another entity, BlueMoon, had what Mr. Smith believed were "monitoring tools" that allowed Kazaa or BlueMoon to monitor "bandwidth, where supernodes were located, and activities of that nature." Plaintiffs' **Ex. 2** (Smith Depo. T.) 112:14-113:2. Thus, Kazaa may have maintained some ability to change variables of supernodes which would "tune" the supernodes to account for changes in traffic on the FastTrack network, which could improve the efficiency with which supernodes processed search requests (for instance, to control the number of times a search request would be passed from supernode to supernode). However, StreamCast never had access to these "tools." Lapple Decl. **Ex. 2** (Smith Depo. T.) 227:11-13. Regardless, the Kazaa monitoring tools discussed above did not allow Kazaa or BlueMoon to modify the features or security of the Morpheus client application - these

	tools could have limited effect on the way respective clients (Morpheus, Grokster, and Kazaa) interoperated. Smith Opp. Decl. ¶ 8. *Morpheus-Gnutella* DISPUTED. The Gnutella-based versions of Morpheus did not have upgrade capabilities, and thus did not use a digital key. Although Morpheus 2.0 is upgradeable and does utilize a digital key, the purpose of using a digital key is to verify that upgrades to any Morpheus program come from StreamCast and not some third party. Smith Opp. Decl. ¶¶ 35-36.
(b) Defendants have the means to require users to upgrade to a new version of the client application as a condition of users' continued ability to connect to the network. Kleinrock Decl. ¶¶ 50, 58; **Ex. 2** (Smith Depo. T.) 97:7-99:8;115:15-116:20, 1473:3-19, 15 1:12-152:4, 154:25-155:12, 156:23-160:20, 203:24-204:2, 205:2-12, 205:22-206:1, 211:9-212:2, 214:6-17, 215:5-216:3,	DISPUTED. StreamCast does not have "a means to require users to upgrade to new versions of the Morpheus software program" as a condition of Morpheus software users' continued ability to use the Morpheus software program to join together to form a user network. In fact, the testimony relied on by Plaintiffs demonstrates exactly the opposite. Like

218:10-16, 220:22-25, 221:11-13, 314:2-25, 317:2-319:15, 333:12-334:8, 335:20-336:19, 348:5-8, 348:10-14, 348:19-24, 530:16-24, 53 1:2-25, 532:1-13, **Ex. 11**, 438220, 438220 (attach. p. 1), 544409 [Smith Depo. Ex. 152], 168207 [Smith Depo. Ex. 156], 168216 [Smith Depo. Ex. 157], 176153 [Smith Depo. Ex. 198], 437346 [Smith Depo. Ex. 201], 545361 [Smith Depo. Ex. 168], 545901 [Smith Depo. Ex. 192], 436095 [Smith Depo. Ex. 196], 544361 [Smith Depo. Ex. 229].	software vendors generally, StreamCast updates and periodically makes available new versions of its software which users may freely chose to download or not. Smith Opp. Decl. ¶ 39. While StreamCast strives to improve its software with each new version and encourages Morpheus users to update their software, it has no ability to require Morpheus users to update their software. Smith Opp. Decl. ¶ 39. Professor Kleinrock admitted as much at his deposition. Lapple Decl. **Ex. 6** (Kleinrock Depo. T.) 117:6-23. *Morpheus-FastTrack* DISPUTED. The evidence cited by Plaintiffs uncontrovertibly demonstrates that StreamCast *could not have* required users of these versions to upgrade to new versions of the software application. While Morpheus was based on the FastTrack architecture, StreamCast never required Morpheus users to upgrade as a condition for connecting

	to other Morpheus users as an upgrade was always an option for users. Smith Opp. Decl. ¶ 40. Users of outdated Morpheus software versions can and do still connect with other users of similar outdated versions. Smith Opp. Decl. ¶40. This is because updates of these versions of Morpheus did not change networking protocols such that users running different versions of software could continue to connect to other users running similar versions. Smith Opp. Decl. ¶ 40. Even when Kazaa altered the peer-to-peer source code to cause subsequent versions of Morpheus to be incompatible with previous versions, the previous versions were fully operative, including their file sharing functions, "indefinitely." Lapple Decl. **Ex. 2** (Smith Depo. T.) 336:20-25. It is not disputed that in February, 2002, Kazaa made an update available to users of Kazaa and Grokster with networking protocols which were different from the networking protocols of

	the Morpheus version. Because Kazaa did not make this update available to StreamCast, users of the then-current version of Morpheus (version 1.3) no longer could connect toGrokster and Kazaa clients or to supernodes. StreamCast thereafter re-designed the file-sharing protocols for its Morpheus software to incorporate the publicly available and pre-existing open-source Gnutella protocols in Morpheus "Preview Edition." Smith Opp. Decl. ¶ 43. *Morpheus-Gnutella* DISPUTED. Plaintiffs fail to submit any evidence supporting the allegation that the versions of Morpheus based upon Gnutella enable StreamCast to require users to "upgrade to a new version of the client application as a condition of users' continued ability to connect to the [Gnutella] network." The sole evidence which Plaintiffs do submit confirms the fact that StreamCast has

	no ability to require that its users "upgrade" to new software versions as a "condition" for accessing the Gnutella user network. Indeed, StreamCast could not require users to accept an upgrade. Lapple Decl. **Ex. 2** (Smith Depo. T.) 514; 1-11; Smith Opp. Decl. ¶¶ 41-42; Gribble Opp. Decl. ¶¶ 42(c), 47. Because the Gnutella user network recognizes the protocols standard to these Gnutella-based versions of Morpheus, any and all upgrades to Morpheus since Morpheus switched to the Gnutella user network in March of 2002 have not affected a user's ability to connect to the Gnutella user network using older versions of Morpheus. Smith Opp. Decl. ¶ 39. Furthermore, requiring a user to accept a download presents intractable problems of security, trust, privacy, and performance. Gribble Opp. Dec. ¶¶ 59-63; Lapple Decl. **Ex. 5** (Gribble Depo. T.) 110:12-115:5.
(c) In their terms of service,	DISPUTED. StreamCast

defendants explicitly provide for their right to terminate users and/or block unlawful content. Kleinrock Decl. ¶¶ 60-61, 63-64; **Ex. 2** (Smith Depo. T.) 16:5-21:7, 17:15-18:12, 154:11-23, 110:15-111:2, 301:19-22, 302:7-23, 302:24-303:25, 304:5-16, 305:12-15, 312:14-19, 313:18-314:1, 325:7-326:16, 335:9-19, 336:9-19, 348:10-329:24, 387:18-390:22; **Ex. 3** (Weiss Depo. T.) 200:25-202:1, 351:7-355:6; **Ex. 11**, 545672 [Smith Depo. Ex. 190], 545735 [Smith Depo. Ex. 191], 545901 [Smith Depo. Ex. 192], 176150 [Smith Depo. Ex. 194], 176153 [Smith Depo. Ex. 198], 437346 [Smith Depo. Ex. 201], 176156 [Smith Depo. Ex. 209], 168351, 545672 [Smith Depo. Ex. 190] ADC-0446-ADC-0447; ADC-0448-ADC-0449; **Ex. 61** (Weiss Depo. Ex. 8).	does not currently utilize a Terms of Service which "provides for [the] right to terminate users and/or block unlawful content." Smith Opp. Decl. ¶ 45. *Morpheus-FastTrack* NOT DISPUTED. StreamCast does not dispute that in regard to the FastTrack versions of Morpheus, it reserved the right to terminate the account of any user who repeated copyright infringements to the extent "technically feasible to do so." StreamCast also does not dispute that it established a "Repeat Copyright Offender Policy" providing that StreamCast could "to the extent technically possible, terminate the accounts of users who violate copyrights or other intellectual property rights of third parties if we receive <<actual knowledge>> of their infringing activities." StreamCast generally disputes Plaintiffs characterization of the Terms of Service and refers the

	Court to the actual Terms of Service cited by Plaintiffs. In addition, the evidence cited by Plaintiffs relating to the "user banned list" is irrelevant to the issue of what the Terms of Service provides. The "user banned list" was a feature which was intended to be used to ban IP addresses of computers *hacking* into the FastTrack network. Because IP addresses of most individual internet users are "dynamic," or change with each connection, banning IP addresses is not an effective method of prohibiting individual users from committing copyright infringement. Gribble Opp. Decl. ¶ 42(b), Smith Opp. Decl. ¶ 47; Kleinrock Decl. ¶ ___. StreamCast never used the user banned list to "terminate users or block unlawful content." Smith Opp. Decl. ¶ 47. *Morpheus-Gnutella* DISPUTED. Because the Gnutella Protocol does not permit the identification of individual users of the

	Gnutella user network, the Gnutella-based versions of Morpheus do not "provide for [the] right to terminate users and/or block unlawful content." Smith Opp. Decl. ¶ 45. StreamCast does not condition use of the peer-to-peer functions of these versions of Morpheus on acceptance of a Terms of Service or user agreement. Smith Opp. Decl. ¶ 45.
(d) In their license agreements, defendants explicitly provide for their right to disable the network: "Each party reserves the right to disable the Network by disabling its connection to the Network if it deems such action necessary to maintain the integrity of its network or out of concern for its users; for example, if the disconnected party's users are sharing a high percentage of bogus file or in other ways acting in a way that may be harmful or harassing to other users." **Ex. 1** (Griffin Depo. T.) 174:13-24; **Ex. 11** MUS013095-1 18 at 013100 [Griffin Depo. Ex. 265],	*Morpheus-FastTrack* DISPUTED. StreamCast disputes Plaintiffs' representation of the meaning and significance of the license agreement language cited. The license agreement between StreamCast and Kazaa provided that Kazaa would provide StreamCast with Morpheus software which would enable users running Kazaa and Morpheus to interact with each other. Plaintiffs' Ex. 11: pp. 2148, 2167 (MUS 13100, 13119). The license section cited by Plaintiffs provides that both Kazaa and StreamCast

MUSO131 19-20.	reserved the right to prohibit the interoperability of their respective software applications. It does not establish that StreamCast could cause the FastTrack network to cease operating, which it could not do. Smith Opp. Decl. ¶ 46. *Morpheus-Gnutella* DISPUTED. The license agreement cited by Plaintiffs is not relevant to the Gnutella-based versions of Morpheus. The licenses for these versions of Morpheus do not permit StreamCast to disable the Gnutella user network, which it cannot do. Smith Opp. Decl. ¶ 46.
(e) The KazaaLib API programming guide confirms that defendants have effective control over all files users download or offer for distribution via defendants' network: "KazaaLib maintains a list of local files that are under its control ... Via KazaaLib the user program can perform operations on these files, such as enabling/disabling	*Morpheus-FastTrack* DISPUTED. StreamCast does not "have effective control over all files users download or offer for distribution." Plaintiffs' statement confuses the capabilities of a defendant (StreamCast) with the functions which may be performed by a product (Morpheus). The KazaaLib API programming guide is a

sharing... In addition to configured directories, all files in download directory (and its sub-directories) are always under KazaaLib control." Kleinrock Decl. ¶¶ 67-68; **Ex. 2** (Smith Depo. T.) 417:18-419:2, 420:2-5; **Ex. 10** (Rose Depo. T.) 53:10-54:7; **Ex. 11**, 545105 [Smith Depo. Ex. 215].	document which can be used by persons creating programs that interact with the KazaaLib program to cause the KazaaLib program to perform certain functions. The statement in the programming guide in fact indicates that the software program, Kazaa Lib, can perform certain functions on files after the KazaaLib program is installed on a user's computer. Yet, it is the user, not StreamCast, who directs the client application which contains the KazaaLib programming code to perform those functions. Kazaa maintained complete control over the KazaaLib source code such that the API programming guide could not be used to alter the KazaaLib source code. Smith Opp. Decl. ¶¶ 26-29; Gribble Opp. Decl. ¶ 35. Prof. Kleinrock admitted at his deposition that, contrary the sworn testimony in his declaration, he was not aware of whether StreamCast's servers have "effective control over all files users download or offer

	for distribution . . ." Prof. Kleinrock also admitted that he was "not sure" whether StreamCast had control over user files. Further, Prof. Kleinrock admitted that the ability to control which files were shared or not shared via the Morpheus client was controlled by the software *user*; not any StreamCast server. Lapple Decl. **Ex. 6** (Kleinrock Depo. T.) 109:16-111:20. In addition, StreamCast lacked any ability to control the files a user of the Fast Track versions of Morpheus could or could not share. Kazaa, not StreamCast, designed the file sharing functionality of the FastTrack versions of Morpheus. No StreamCast server had access to or control over the files a user of these versions of Morpheus could share or download. After extensive cross examination, Prof. Kleinrock admitted that the only way to affect a user's ability to transfer files was to *rewrite the Morpheus software code*. Lapple Decl. **Ex. 6** (Kleinrock Depo. T.)

	106:10-117:23. Finally, Prof. Kleinrock has also admitted that StreamCast had no ability to enact a change to the software code. Lapple Decl. **Ex. 6** (Kleinrock Depo. T.) 113:19-114:10. *Morpheus Gnutella* DISPUTED. The evidence submitted by Plaintiffs is not relevant to the versions of Morpheus based on Gnutella, which do not utilize the KazaaLib program.Smith Opp. Decl. ¶ 43.
(f) Defendants have the ability to alter, fine-tune and control important functionality in the client applications and the network as a whole from their central servers, including by making changes to variables in defendants' central kazaaservers. Kleinrock Decl. ¶ 49(a); **Ex. 1** (Griffin Depo. T.) 252:3-10; **Ex. 2** (Smith Depo. T;) 112:14-113:25, 168:5-170:13, 190:10-191:19; 192:6-193:22, 195:2-23, 196:10-19, 196:23-198:5, 197:18-198:3, 199:10-23; 254:7-17, 314:2-25, 317:2-319:15; 333:12-334:8,	*Morpheus-FastTrack* StreamCast did not have the ability to alter, fine-tune and control "important functionality" in the client applications and the network as a whole from its central servers. Smith Opp. Decl. ¶ 11, Gribble Opp. Decl. ¶ 52. The evidence cited by Plaintiffs demonstrates that StreamCast had little control at all over the functioning of the client applications; certainly not the level of control which Plaintiffs deem as the "important" control of being able to to affect the

335:20-336:19, 394:20-395:1, 396:18-22, 398:7-11, 412:14-413:17, 415:17416:5, 513:12-14,513:19-514:5, 516:5-519:7, 520:20-522:19; 523:22-24; **Ex. 11**, 164278, 164299, 168257 [Smith Depo. Ex. 163]; 176100 [Smith Depo. Ex. 164], 176153, 436095 [Smith Depo. Ex. 196], 437346, 544965 [Smith Depo. Ex. 160], 176100 [Smith Depo. Ex. 164], 545105 [Smith Depo. Ex. 164], 174635 [Smith Depo. Ex. 165], 545901 [Smith Depo. Ex. 192], 1532155 [Griffin Depo Ex. 286], 1536222 [Smith Depo. Ex. 213], 265960.1 at .17, 176153, 544965; **Ex. 15**, T00025; **Ex. 16**, MJTO27O; **Ex. 67** Smith Depo. Ex. 225.	client application so as to prohibit potential copyright infringement by filtering or blocking particular files. The testimony of Mr. Griffin cited by Plaintiffs plainly shows that StreamCast *lacked* the ability to affect the "network as a whole" as it refers to Kazaa's release of an upgrade of the Kazaa software, which was not distributed to users of Morpheus, causing Morpheus clients to be unable to communicate with Kazaa and Grokster clients. Lapple Decl. **Ex. 1** (Griffin Depo. T.) 252:3-10. Similarly, the portions of the Smith deposition transcript cited by Plaintiffs reference actions undertaken by *Kazaa* or *Blue Moon*, not StreamCast. Lapple Decl. Ex. 2 (Smith Depo. T.) 112:14-113:25. What little control StreamCast did retain could not be described as "important" as it is not necessary to the functionality of the Morpheus clients and could not have controlled or prevented the alleged infringement claimed by

	Plaintiffs. Prof. Kleinrock testified at deposition that each of the "control" mechanisms he references in paragraph 49 of his declaration give StreamCast *no ability to control the sharing, copying, or downloading of files*. Lapple Decl. **Ex. 6** (Kleinrock Depo. T.) 92:44-97:9. None of the evidenced cited by Plaintiffs demonstrates any ability by StreamCast to control or prevent users from searching for, sharing, or downloading particular files while using the then-current architecture of the Morpheus software product. Using the kazaaserver software provided by Kazaa, which, like the KazaaLib and Kazaa source code, StreamCast did not design and could not alter, StreamCast was able to alter certain functioning of Morpheus clients. Streamcast could change variables in a file entitled "kazaaserver.ini", which would alter certain variables, including switching from one client protocol to another, switching encryption

	standards, determining the maximum time that a client would continue searching for a file, limiting the amount of metadata that could be searched, and determining if a client contacting a streamcast server was running the most recent version of Morpheus. These variables had the effect of altering the way in which Morpheus clients interacted with one another; none of these variables affected "important functionality" and could not control or prevent users from searching for, sharing, or downloading particular files. Smith Opp. Decl. ¶¶ 11 and 24. The Plaintiffs' references to the Smith deposition transcript relating to the "giFT" hackers do not show and "important" control and do not show the ability to control or prevent users from searching for, sharing, or downloading particular files. Smith Opp. Decl. ¶¶ 11 and 24. All other citations by Plaintiffs regard the ability of Blue Moon or Kazaa to affect the network. These

	entities are not affiliates of or owned or controlled by StreamCast and as such Plaintiffs have shown no basis on which to impute the actions of such independent entities to StreamCast. Smith Opp. Decl. ¶ 13. *Morpheus-Gnutella* DISPUTED. StreamCast has no ability to "alter, fine-tune and control important functionality" in the Morpheus applications designed to interoperate with other clients on the Gnutella network. After a user downloads and installs Morpheus on her computer, StreamCast servers have no ability to monitor or prevent the use of Morpheus to join the Gnutella Network, designate files for sharing, select files for searching, or select files for downloading. StreamCast has very limited ability to affect the peer-to-peer functionality of the Morpheus client application. StreamCast maintains a file on its server entitled "auto.xml" which each Morpheus client reads on

	initiation and at some set period thereafter. None of the variables on the auto.xml file can be used to monitor or prevent the use of Morpheus to join the Gnutella user network, designate files for sharing, select or deselect files for searching or downloading. This functionality is neither "important" nor necessary for the software to operate correctly. Smith Opp. Decl. ¶¶ 41-42; Gribble Opp. Decl. ¶¶ 43, 46, 48, 49.
(g) Defendants have had the ability to control the provision of supernode IP addresses to users, and thus access to the system, (initially) by operating central server "root" supernodes and (later) by embedding a listing of supernode IP addresses in the client application upon installation. Kleinrock Decl. ¶¶ 37(b) and 48; **Ex. 2** (Smith Depo. T.) 97:7-99:8, 122:15-18, 125:13-17, 128:8-18, 132:7-15, 167:22-168:4, 172:18-173:14, 177:4-178:7, 247:23-250:6-18, 341:5-16, 358:23-359:3, 360:24-361:1,	*Morpheus-FastTrack* DISPUTED. StreamCast has not controlled the provision of supernode IP addresses through root supernodes. A "root supernode" is a computer which maintains and provides the IP address of regular supernodes which are likely to be active. Smith Opp. Decl. ¶ 15. In this way the root supernode functions similar to a host cache on the Gnutella user network; maintaining a list of IP addresses of regular supernodes which it supplies

361: 21-362:1, 363:15-364:3, 366:24-368:10, 368:6-23, 377:16-22, 378:3-379:6, 383:7-17, 385:10-14, 376:13-377:10, 380:12, 381:17, 382:8-383:17, 411:13-25; **Ex. 11**, 164071 [Smith Depo. Ex. 202], 168236, 172758 [Smith Depo. Ex. 174], 164071 [Smith Depo. Ex. 202], 18154, 544409 [Smith Depo. Ex. 151], 168144 [Smith Depo. Ex. 152], 168154 [Smith Depo. Ex. 153], 168217 [Smith Depo. Ex. 159], 2108171 (and attach.), 436159, 168236 [Smith Depo. Ex. 162], 168355.	to any client requesting such a list, thereby allowing the client to "bootstrap", or to find an active supernode. Gribble Opp. Decl. ¶ 36(b); Smith Opp. Decl. ¶ 15; Lapple Decl. **Ex. 2** (Smith Depo. T.) 122:15-18. StreamCast operated a single root supernode from approximately April 19, 2001 until approximately one to two months later, or until between May 15 and June 15, 2001. Lapple Decl. **Ex. 2** (Smith Depo. T.) 371:5-372:8; 377:16-378:2. Smith Opp. Decl. ¶ 16. After this brief period, StreamCast ceased operating a root supernode when the server operating the root supernode crashed, and because Kazaa redesigned the software in a new version, Morpheus 1.3. Lapple Decl. **Ex. 2** (Smith Depo. T.) 375:13-18. Morpheus version 1.3 included a list of predetermined IP addresses of regular supernodes within the software code (controlled by Kazaa) which enabled each Morpheus 1.3 user to locate a regular supernode

	without contacting a root supernode, making the root supernode superfluous. Lapple Decl. **Ex. 2** (Smith Depo. T.) 362:7-363:3; [Smith Depo. Ex. 198]. Morpheus version 1.2 did not include embedded IP addresses. Lapple Decl. **Ex. 2** (Smith Depo. T.) 376:11-25; Smith Opp. Decl. ¶ 20. The embedded IP addresses were chosen by Kazaa. StreamCast has never had access to the software code which performed the file sharing functions of Morpheus 1.3 and therefore did not provide the IP addresses included in the download of the Morpheus software. Smith Opp. Decl. ¶ 21. StreamCast's operation of a root supernode did not control a Morpheus user's ability to connect to other computers on the Fast Track user network; StreamCast's root supernode operated only as a "back up" in case Morpheus clients could not connect to one another on their own, in which case the root supernode would supply IP

	addresses of potentially operative regular supernodes. Smith Opp. Decl. ¶¶ 16-18; Lapple Decl. **Ex. 2** (Smith Depo. T.) 122:15-124:7. StreamCast ceased operating a root supernode until approximately October 3, 2001, when Kazaa provided an updated version of the root supernode software to StreamCast. Mr. Smith is not aware of whether the new root supernode software ever actually worked. Lapple Decl. **Ex. 2** (Smith Depo. T.) 384:24-385:18. The root supernode began in October ceased operation no later than December, 2001. Smith Opp. Decl. ¶ 18. Mr. Smith testified that he believes that Streamcast's root supernode was not used by any Morpheus clients to bootstrap onto the FastTrack user network. Lapple Decl. **Ex. 2** (Smith Depo. T.) 124:11-125:12. *Morpheus-Gnutella* DISPUTED. The Gnutella-based versions of Morpheus have never utilized a root supernode, but instead utilize

	independently-run host caches to "bootstrap," or locate other computers running compatible software. StreamCast has never imbedded IP addresses into the Gnutella-based versions of Morpheus. Smith Opp. Decl. ¶ 33.
(h) Defendants have the ability to change, and thus control, the system communications protocol and encryption, thereby preventing client applications not using defendants' protocol and encryption from communicating with client applications that are. Kleinrock Decl. ¶ 49(c); **Ex. 1** (Griffin Depo. T.) 252:3-254:13; **Ex. 2** (Smith Depo. T.) 263:24-264:7, 266:8-20, 268:6-11, 271:19-25; 272:25-274:16; 278:14-21; 3 14:2-25, 3 18:18-3 19:15, 336:9-19, 347:7-349:24, 353:8-22, 354:16-355:22, 417:14-17; **Ex. 11**, MU5013603, 438186 [Smith Depo. Ex. 179], 173005 [Smith Depo. Ex. 180], 176153 [Smith Depo. Ex. 198], 164278 [Smith Depo. Ex. 199], 164299	*Morpheus-FastTrack* DISPUTED. StreamCast did not have the ability to change a "system protocol." The protocol that the FastTrack versions of Morpheus utilized was set in the source code, over which StreamCast had no control. If the source code allowed a client to utilize one of a number of protocols, StreamCast did have the ability to cause Morpheus clients to switch to a different encryption or protocol by making a change in the kazaaserver.ini file. Changing encryption or protocol affects the language which active Morpheus clients uses to communicate with one another. The ability to select an encryption or protocol parameter does not

[Smith Depo. Ex. 200], 437346 [Smith Depo. Ex. 201], 437346, ID:438186, ID:443896, 441739, 174571.1, 545901, 545735.	give StreamCast any ability to monitor or prevent the use of Morpheus to create or join a network, designate files for sharing, select or deselect files for searching or downloading. Smith Opp. Dec. ¶ 53; Gribble Opp. Decl. ¶ 42(c). *Morpheus-Gnutella* DISPUTED. StreamCast cannot alter the encryption or protocol of Morpheus Preview Edition and Morpheus Version 1.9. StreamCast can alter the encryption or protocol of Morpheus 2.0 only by altering the source code of the program; it cannot alter the encryption or protocol via the auto.xml file maintained on StreamCast's server. Smith Opp. Decl. ¶ 42; Gribble Opp. Decl. ¶¶ 48, 49. The ability to select an encryption or protocol parameter does not give StreamCast any ability to monitor or prevent the use of Morpheus to create or join a network, designate files for sharing, select or deselect files for searching or

	downloading. Smith Opp. Decl. ¶ 53.
(i) Defendants have controlled access to their system by changing the communications protocol and encryption in order to block access to unwanted third parties who were trying to reverse engineer the client application, in what was known as the giFT project. Kleinrock Decl. ¶¶ 61, 63-64; **Ex. 2**, (Smith Depo. T.) 110: 15-11:2, 301:23-303:25, 311:9-3 13:1, 3 14: 1-25; 317:2-319:15; 325:7-326:16, 333:12-334:8 335:20-336:19; 335:9-19, 348:7-349:24, 387:18-390:22; **Ex. 3** (Weiss Depo. T.) 606:19-608:4; **EX. 11**, 164299, 545672 [Smith Depo. Ex. 190], 545735 [Smith Depo. Ex. 191], 176150 [Smith Depo. Ex. 194], 545901 [Smith Depo. Ex. 192], 436095 [Smith Depo. Ex. 196], 176153 [Smith Depo. Ex. 198], 437346 [Smith Depo. Ex. 201], 176156 [Smith Depo. Ex. 209).	*Morpheus-FastTrack* DISPUTED. StreamCast incorporates herein its Response to 6(h) above. In addition, the evidence cited by Plaintiffs relating to the giFT project shows that StreamCast caused active Morpheus programs to switch from one encryption built into the source code to another encryption built into the source code in order to inhibit hackers, including hackers from the giFT project, from causing computers running Morpheus to conduct a "distributed denial of service attack" on other computers. Smith Opp. Decl. ¶¶ 51-53. Even after the encryption protocol was changed, hackers from the giFT project could cause their program to interact with other Morpheus, Grokster, and Kazaa users; the change simply inhibited the ability of these hackers to initiate a distributed denial of service attack. The ability to change

	encryption parameters does not give StreamCast any ability to monitor or prevent the use of Morpheus to join together to form a network, designate files for sharing, search for or download particular files. Smith Opp. Decl. ¶¶ 42; 51-53. *Morpheus-Gnutella* DISPUTED. Because the Gnutella Network utilizes open source, protocols, and standards, giFT hackers have not (and need not) attempted to hack into the Gnutella user network. StreamCast could not alter the encryption or protocol of Morpheus Preview Edition and Morpheus Version 1.9. StreamCast can alter the encryption or protocol of Morpheus 2.0 only by altering the source code of the program; it cannot alter the encryption or protocol via the auto.xml file maintained on StreamCast's server. Smith Opp. Decl. ¶ 42. The ability to select an encryption or protocol parameter does not give StreamCast any ability to monitor or prevent

	the use of Morpheus to create or join a network, designate files for sharing, select or deselect files for searching or downloading. Smith Opp. Decl. ¶ 53; Gribble Opp. Decl. ¶¶ 48, 49.
(j) Defendants have controlled access to their system by adding a layer of security to prevent further access to communications port 1214 by any unauthorized client applications. **Ex. 2**, (Smith Depo. T.) 149:17-19, 150:13-23; **Ex. 11**, 5130.1, 137190.1, 168144, 168223, 168351.1.	*Morpheus-FastTrack* DISPUTED. The evidence cited by Plaintiffs relates to alleged actions by other defendants utilizing the Fast Track protocols after StreamCast ceased utilizing these protocols. Smith Opp. Decl. ¶ 95. Therefore this evidence is not relevant to the FastTrack versions of Morpheus distributed by StreamCast. *Morpheus-Gnutella* DISPUTED. The evidence cited by Plaintiffs does not relate to the Gnutella-based versions of Morpheus.

(k) Defendants have exercised control over their system by blocking users both by usernames and IP addresses. Kleinrock Decl. ¶¶ 60-61; **Ex. 1** (Griffin Depo. T.) 290:14-18; 398:1-399:5; 402:8-403:16; **Ex. 2** (Smith Depo. T.) 16:5-19, 17:13-22, 17:15-18:12, 19:9-19, 20:15-21:7, 92:23-93:18, 94:24-95:10, 97:10-13, 97:20-23; 99:4-8, 110:14-111:2, 147:3-19; 152:20-154:23, 154:11-23, 301:19-22, 301:23-303:25, 304:5-16, 305:12-15, 311:9-313:1, 312:14-19, 313:15-314:1, 345:5-346:9, 530:16-24, 531:2-25, 532:5-9; **Ex. 11**, 545672 [Smith Depo. Ex. 190], 545735 [Smith Depo. Ex. 191], 176150 [Smith Depo. Ex. 194], 544409 [Smith Depo. Ex. 151], 168207 [Smith Depo. Ex. 156], 546010 [Smith Depo. Ex. 197], 544361 [Smith Depo. Ex. 229], 167545, 544361.	*Morpheus FastTrack* DISPUTED IN PART. StreamCast did utilize a feature of the kazaaserver to delete the usernames from the database of known users contained in the kazaaserver. Deleting a username had the effect of causing a user whose username was deleted to be unable to connect to other users. Upon receiving notice from a party (including several Plaintiffs or their representatives here) alleging that a Morpheus user was committing infringement, StreamCast promptly deleted the username of all users who were accused of acts which were alleged to constitute infringement. Lapple Decl. **Ex. 2** (Smith Depo. T.) 17:13-18:6; Smith Opp. Decl. ¶ 54. However, these actions do not show that StreamCast had any control over the FastTract user network. *Morpheus-Gnutella* DISPUTED. Because the Gnutella protocol is not compatible with usernames,

	StreamCast is unable to control access to the Gnutella user network through either username deletion or IP blocking. Smith Opp. Decl. ¶ 43; Gribble Opp. Decl. ¶¶ 10, 22.
(l) Defendants have exercised control over their system by taking affirmative steps to prevent access by firms retained by copyright owners to monitor and police copyright defendants' infringement on defendants' systems. Kleinrock Decl. ¶ 62; **Ex. 2** (Smith Depo. T.) 201:25-202:22, 203:24-204:15-19, 205:22-206:1, 207:12-25; 211:9-212:2, 212:14:25, 213:11-216:11, 218:10-16, 220:22-25, 221:11-13, 530:16-24; 531:2-25; 532:10-13; **Ex. 3** (Weiss Depo. T.) 354:11-21, 533-535; **Ex. 11,** 167545, 172350, 174635 [Smith Depo. Ex. 165], 544361 [Smith Depo Ex. 229], 545341 [Smith Depo. Ex. 166]; 545361 [Smith Depo Ex. 168], MU5013602-04, 172619; 167545, 544361 [Smith Depo. Ex. 229], 174635 [Smith	*Morpheus-FastTrack* DISPUTED IN PART. StreamCast did not take any step to prevent any firm from monitoring or policing alleged copyright infringement by any Morpheus user. Plaintiffs cite testimony showing that some third parties had created hacking software which claimed to allow access to computers running the *Kazaa* software (not Morpheus). StreamCast became aware of these reports, purchased a copy of the hacking programs and forwarded the copy to a representative of Blue Moon. Lapple Decl. **Ex. 2** (Smith Depo. T.) 215:14-216:11. StreamCast did not participate in any action against MediaEnforcer. Smith Opp. Decl. ¶ 55.

Depo. Ex. 165]; 545341 [Smith Depo. Ex. 166]; 545361 [Smith Depo. Ex. 229]; **Ex. 15,** T000056-58 [Weiss Depo. Ex. 15].	*Morpheus-Guntella* DISPUTED. The Plaintiffs evidence is not relevant to the Gnutella-based versions of Morpheus. As these versions of Morpheus are open source, any entity may create a program utilizing the protocols to search the Gnutella user network.
(m) Defendants exercised control overtheir system in early 2002 by disabling the ability of all MusicCity users to access the network or communicate with each other. Kleinrock Decl. ¶¶ 39, 65; **Ex. 1** (Griffin Depo. T.) 252:3; 254:13; **Ex. 2** (Smith Depo. T.) 97: 10-23; 98:16-99:8, 110:14, 111:22, 131:3-17; 398:2-417:17; **Ex. 11,** 1532134 [Smith Depo. Ex. 211], 165013, 1536222, 544409 [Smith Depo. Ex. 151], 168144 [Smith Depo. ex. 152], 1532155 [Griffin Depo. Ex. 286].	*Morpheus-FastTrack* DISPUTED. Streamcast did not disable the ability of users of the Morpheus program to join together to form a user network. Indeed, the evidence relied on by Plaintiffs shows that StreamCast *lacked* the ability to control access to the FastTrack user network. In February, 2002, Kazaa made an update available to users of Kazaa and Grokster with networking protocols which were different from the networking protocols of the then-current Morpheus version. Because Kazaa did not make this update available to StreamCast, users of the then-current version of

	Morpheus (version 1.3) no longer could connect to Grokster and Kazaa clients or to supernodes. StreamCast thereafter re-designed the file-sharing protocols for its Morpheus software to incorporate the publicly available and pre-existing open-source Gnutella protocols in Morpheus "Preview Edition." However, users of outdated versions of Morpheus still can and do connect together to form a user network without the need for any contact, support, or assistance from StreamCast. Smith Opp. Decl. ¶ 40. *Morpheus-Gnutella* DISPUTED. The evidence cited by Plaintiffs is not relevant to these versions of Morpheus.
(n) Defendants have the ability to display any content of their choosing to users inside the client application for as long as users are connected to the network. Kleinrock Decl. ¶¶ 37(c)-(d), 43(a); **Ex. 2** (Smith Depo. T.)	DISPUTED. StreamCast does not have the ability to display any "content of [its] choosing to users inside the client application for as long as users are connected to the network." Smith Opp. Decl. ¶¶ 56-59. This allegation is

61:15-64-10; 97:10-14, 98:16-99:8, 116:21-119:5, 293:16-293:18, 298:8-300:3, 489:13-490:3, 490:13-491:3, 492:11-18; 5 13:12-14, 516:5-519:7, 520:20-522:19, 523:22-24; **Ex. 11**, 257299.1 at .8, 265960.1 at .17, 1637139, 168144 [Smith Depo. Ex. 152]; **Ex. 67** (Smith Depo. Ex. 225).	disputed for several reasons. First, Morpheus utilizes a user's Internet Explorer web browser for several functions which permit StreamCast to display information and advertising within certain portions of the Morpheus user interface. A user may browse the Internet from within the Morpheus GUI just as if the user were running a web browser alone, and the content displayed while browsing the Internet using Morpheus is the same content as would be available using a browser alone. A user need not be in contact with a StreamCast server in order to browse the Internet in this fashion. Smith Opp. Decl. ¶¶ 56-59. Second, these versions of Morpheus included a "start" or "home" page whereby StreamCast could provide information or messages to users from within the Morpheus GUI. This information was hosted on StreamCast servers and Morpheus users could access this information in the same way that they could access information while operating

	a browser and simply browsing StreamCast's web server, and thus is available whether or not the user is using the Morpheus software. Smith Opp. Decl. ¶ 58; Gribble Opp. Decl. ¶¶ 37, 42(f), 44. Third, these versions permitted StreamCast to send advertising to a portion of certain windows in the Morpheus application in order to communicate advertising messages to Morpheus users. Smith Opp. Decl. ¶¶ 56-59. These advertising messages are displayed to users whether or not they are utilizing the peer-to-peer functionality of the software; such as when they are browsing the Internet. Smith Opp. Decl. ¶¶ 56-59. Finally, Morpheus users need not contact any StreamCast server to join together to form a network. Smith Opp. Decl. 43. StreamCast's ability to communicate advertising and information to Morpheus users is not a prerequisite of the functioning of the peer-to-peer portion of the

	Morpheus software application. Thus, even if one engages in no searching, sharing, downloading, or playing of media files, the graphics and advertising will be displayed on the software interface. As such, the advertisements sold by StreamCast Networks are operated independent of the use of the peer-to-peer application. Smith Opp. Decl. ¶ 59.
(o) Pursuant to their software license agreements with Kazaa, defendants have or had the right to request that Kazaa make changes to the software that is the subject of the license. **Ex. 2** (Smith Depo. T.) 247:23-248:22, 249:5-250:18; **Ex. 11**, 172758 [Smith Depo. Ex. 174], BDE-01075-77; **Ex. 13**, KZ000723-42.	*Morpheus-FastTrack* DISPUTED. The software license agreement between Kazaa and StreamCast does not provide StreamCast a "right" to request that Kazaa or Consumer Empowerment implement any changes to the Kazaa software. Paragraph 7.2 of that agreement provides that any changes to the software requested by StreamCast would be the subject of a separate agreement and be paid for separately by StreamCast. Plaintiffs Ex. 13, pg. 2735 (KZ 000725). In fact, StreamCast did make

	a number of requests of Kazaa to change the software, most of which were ignored or refused. Smith Opp. Decl. ¶ 27. Therefore, Kazaa was not obligated to make changes requested by StreamCast. StreamCast does not dispute that on one occasion Kazaa voluntarily performed some "custom work" regarding Morpheus, and requested payment for such work outside of the license agreement cited by Plaintiffs. Smith Opp. Decl. ¶ 27; Plaintiffs' Ex. 11, pg. 1248 [Smith Depo. Ex. 174]. *Morpheus-Gnutella* DISPUTED. The evidence cited by Plaintiffs is not relevant to these versions of Morpheus.
(p) Defendants have monitored and exercised control over their message boards by deleting user postings that they find objectionable. **Ex. 1** (Griffin Depo. T.) 280:9-281:10; 288:6-290:18; **Ex. 3** (Weiss Depo. T.) 32749, 357-59.	*Morpheus-FastTrack* DISPUTED IN PART. StreamCast does not dispute that it operated discussion boards at the website. *http:www.musiccity.com* from May-August, 2001. These discussion boards

	were open to the public and available to anyone navigating to the MusicCity.com website with an Internet browser; they were not part of the Morpheus software product. Lapple Decl. **Ex. 3** (Weiss Depo. T.) 327:18-328:18. It is not disputed that StreamCast reviewed the postings on these boards prior to publishing them, and did not post messages appearing to contain "spam," or commercial solicitations, or messages from users who appeared to be attempting to communicate about the alleged availability of copyrighted content. Lapple Decl. **Ex. 3** (Weiss Depo. T.) 327:18-353:16. However, these message boards were not part of, related to, or necessary for the peer-to-peer functionality of the Morpheus software. Smith Opp. Decl. ¶ 60. *Morpheus-Gnutella* DISPUTED. The Gnutella-based versions of Morpheus, which were released beginning in March, 2002, do

	not incorporate discussion boards, which were taken down from the MusicCity.com website in August, 2001; prior to the March 1, 2002 release of Morpheus Preview Edition. Smith Opp. Decl. ¶ 60. The evidence cited by Plaintiffs is therefore not relevant to the Gnutella-based versions of Morpheus.
(q) Defendants have the ability to identify files on the systems and to prevent the distribution of unauthorized copyrighted works. See evidence in support of Uncontroverted Fact No. 7, below.	DISPUTED. As Plaintiffs' refer generally to evidence cited in support of Uncontroverted Fact No. 7, below, StreamCast incorporates by reference all of its responses to Plaintiffs' Alleged Uncontroverted Fact No. 7, below.

Plaintiffs' Alleged Uncontroverted Fact No. 7:

Defendants have the ability to identify and prevent distribution of infringing works.

StreamCast's Response to Plaintiffs' Alleged Uncontroverted Fact No. 7:

DISPUTED. StreamCast disputes that it has the ability to identify and prevent distribution of infringing works. StreamCast responds to each of the particular subfacts identified by Plaintiffs below, but here notes that other than the specific methods of "control" that are identified by Plaintiffs in paragraphs 69-74 of Prof. Kleinrock's

declaration, each of which is disputed, Plaintiffs' expert, Prof. Kleinrock, is unaware of any ways in which StreamCast can control the searches that a user runs on Morpheus, that StreamCast can control the files that are made available for downloading using Morpheus, or that StreamCast can control the particular files that a user downloads using Morpheus. Lapple Decl. Ex. 6 (Kleinrock Depo T.) 120:7-121:17). Smith Opp. Decl. ¶ ____.

PLAINTIFFS' EVIDENCE	STREAMCAST'S RESPONSE
(a) Defendants already have implemented filters to block files that contain adult or offensive content, or that contain "bogus" files or viruses. Kleinrock Decl. ¶¶ 43(c), 69-70 **Ex. 1:** (Griffin Depo. T.) 494:14-495:24; **Ex. 2:** (Smith Depo. T.) 85:18-86:7, 148:25-149:10, 264:19-22, 266:17-21, 268:6-11, 274:17-22, 276:4-12, 528:5-18; **Ex. 4:** (Hardison Depo. T.) 133:23:134:22, 172:17-25; **Ex. 11:** 137374.1, 168201 [Smith Depo. Ex. 150], 168314, 173005 [Smith Depo. Ex. 180], 172288.1, 172948.1, 280581.1, 1532544, 1639380, 431508.1; **Ex. 14:** KV0000523, DV0000078-1	*Morpheus-FastTrack* DISPUTED. StreamCast did not design, code or implement any filters in any of the FastTrack versions of Morpheus. These filters were "implemented", if at all, by Defendant Kazaa. Smith Opp. Decl. ¶ 61. StreamCast acknowledges that the FastTrack versions of Morpheus appear to contain some form of filter for adult or offensive content and some type of filter for viruses. However, the user of each version of the software retained the option of utilizing these filters. StreamCast disputes the implication that the existence of any of these filters provides StreamCast with the ability to identify

39 [Hardison Depo., Ex. 126]	and/or prevent distribution of copyrighted works. Plaintiffs' own expert, Prof. Kleinrock confirmed StreamCast's lack of this ability. Regarding the "adult or offensive content" filter, Prof. Kleinrock made it clear that the use of this filter, or the decision not to use it at all, was completely within the control of the user, not StreamCast. Lapple Decl. **Ex. 6** (Kleinrock Depo. T.) 116:17-117:23; 70:1-11; 71:10-72:3. As to the "bogus file filter," Prof Kleinrock testified that he didn't have any specific knowledge of how the "bogus file filter" actually worked. Therefore, there is no evidence that it could be used to identify and prevent distribution of allegedly infringing works by StreamCast. Lapple Decl. **Ex. 6** (Kleinrock Depo. T.) 74:14-76:2; 117:24; 118:11. Finally, as to virus filtering, Prof. Kleinrock admits that he did not look at the implementation of virus filtering in any version of Morpheus, but that his understanding of virus filtering is that the client application simply looks at the file

	extension. In other words, the filter only determines what kind of file is being offered for sharing. It does not look at the content of a file that is being offered for sharing. Lapple Decl. **Ex. 6** (Kleinrock Depo. T. 72:24-74:13. Therefore, it would be ineffective to determine if a file contained copyrighted content and cannot be evidence of StreamCast's control or ability to block files containing copyrighted content. Lapple Decl. **Ex. 6** (Kleinrock Depo. T.) 72:24-74:13). *Morpheus-Gnutella* DISPUTED. Although these open source versions of Morpheus provide a user with the option of filtering out "adult content," StreamCast disputes the implication that the existence of any of these filters provides StreamCast with the ability to identify and/or prevent distribution of copyrighted works. As to each of these types of file filters, Prof. Kleinrock testified that, to the best of his knowledge, they provide no ability to control or prevent distribution

	of copyrighted works. Lappel Decl. **Ex. 6** (Kleinrock Depo. T. Additionally, with respect to the keyword filter, if a user chooses to use it, this filter will only prevent certain files from appearing in the search results screen for that Morpheus user. It will not prevent other Gnutella based clients (such as Bearshare, Limewire or Xolox) From "seeing" files that would be filtered with the Morpheus keyword filter engaged by a particular user. Smith Opp. Decl. ¶ 63.
(b) Defendants already scan each file offered for distribution by users, and collect metadata, which describes the content of the file by such descriptors as title and artist (as well as other identifying information), and calculate a unique "hash" for each file. Kleinrock Decl. ¶¶ 71-74; **Ex. 2** (Smith Depo. T.) 222:2-22, 417:18-419:2, 424:17-426:4, 428:15-429:17, 430:21-25, 476:8-478:4, 479:21-480:9, 526:15-527:8, 527:12-528:4;	*Morpheus-FastTrack* DISPUTED. Plaintiffs again misrepresent the potential functions of the Morpheus software to be the actual actions of StreamCast itself. StreamCast does not "scan each file offered for distribution by users." StreamCast is aware that the FastTrack versions of the Morpheus software, as implemented by Defendant Kazaa, may have collected certain metadata regarding file contents. However, this scanning and collection of

Ex. 11, MUS012661-64, MUS013095-114, MUS013618,16823 [Smith Depo. Ex. 171], 344476.1, 34476.2, 545105 [Smith Depo. Ex. 215], 2102464, 2103493, 2103496, 280699.8, 2108318; **Ex. 14,** KVO000143; **Ex. 15,** T000132, T000167, **Ex. 68** (Smith Depo Ex. 227).	metadata was performed at the direction of a user by the Morpheus software, not by StreamCast itself. Smith Opp. Decl. ¶ 64. To the extent that metadata was collected by the client application of the FastTrack versions of Morpheus, none of this metadata was ever returned to any computer owned or operated by StreamCast. Smith Opp. Decl. ¶ 64. Plaintiffs expert, Prof. Kleinrock, testified that the metadata is actually collected by the client software sent to FastTrack supernodes, but is *not* sent to any central server owned or operated by StreamCast. In other words, this metadata is not accessible by StreamCast, and therefore cannot be used to identify and prevent distribution of allegedly infringing works. Lapple Decl. **Ex. 6** (Kleinrock Depo. T.) 118:12-120:4; 58:8-59:7. With regard to the unique "hash" referred to by Defendants, Prof. Kleinrock's declaration (¶ 73) states that a hash is simply another form of

	metadata which, as explained above, is not sent back to any StreamCast server in any way that would enable StreamCast to identify and prevent distribution of allegedly infringing works. *Morpheus-Gnutella* DISPUTED. Again, StreamCast has no role in the scanning or collection of metadata. Morpheus Preview Edition and Morpheus 1.9 do not collect or use any metadata at all. Smith Opp. Decl. ¶ 65. The client application Morpheus 2.0 does collect metadata for audio files only, at the option of the user. In other words, this metadata collection is an option that can be turned on or off by the user, Again, as with the FastTrack versions of Morpheus, this metadata is not in any way sent back to any computer that is owned or operated by StreamCast. Smith Opp. Decl. ¶65.
(c) Defendants have the ability to identify files based on the text of file names, based on the metadata based	DISPUTED. StreamCast does not have the ability to identify files based on the text file names, based on metadata, or

on the unique hash, and/or based on commercially available "fingerprinting" technologies. Kleinrock Decl. ¶¶ 74, 76-81' Bres; om Decl.; Ikezoye Decl.; Hyman Decl.; **Ex. 2** (Smith Depo. T.) 90:18-91:5, 417:18-419:2, 424:17-426:4, 428:15-429:17, 430:6-10, 430:21-25, 431:1-432:6, 474:22-478:4, 478:24480:9, 526:16-528:18; **Ex. 11**, MUS012661-4, 150543, 265918, 280699, 1-24, 545105 [Smith Depo. Ex. 215]; **Ex. 14**, KVO000143	based on a unique hash, as described more fully in StreamCast's Response to 7(a) & 7(b) above. *Morpheus-FastTrack* DISPUTED. StreamCast did not have the ability to identify files, or to implement any filters or identifying mechanisms in the FastTrack versions of Morpheus. Any such filtering mechanisms would have required modifications to source code. StreamCast did not have access to the KazaaLib source code to make these modifications. Smith Opp. Decl. ¶ 61. Prof. Kleinrock admitted that, in order for StreamCast to utilize any of the commercially available "fingerprinting" technologies to identify files and prevent distribution of infringing works, StreamCast would be required to redesign the Morpheus software. Lapple Decl. **Ex. 6** (Kleinrock Depo. T.) 78:23-79:19; 81:11-83:3. In other words, this"ability" is not present in any past or current version of Morpheus. It is simply something that

	Plaintiffs would ask this Court to require StreamCast to implement. Prof. Kleinrock testified that his knowledge of acoustic fingerprinting is limited to his reading of the declarations of representatives of the companies known as Relatable, GraceNote and "AudioGalaxy." [sic., most likely Prof. Kleinrock was actually referring to Audible Magic, the company that Mr. Ikezoye is associated with.] Lapple Decl. **Ex. 6** (Kleinrock Depo. T.) 83:5-84:5; 84:9-12). Additionally, utilizing "fingerprinting" technology would require StreamCast to have direct access to the original content (copyrighted sound recordings) that should be either "filtered in" or "filtered out." StreamCast does not have, and has never had access to all of the original content that Plaintiffs would have StreamCast "fingerprint." Smith Opp. Decl. ¶ 67. As to the declarations submitted by Mr. Breslin, Mr. Ikezoye and Mr. Hyman, none of these declarants testify that their filtering technology has been implemented on a distributed

	peer-to-peer user network such as FastTrack or Gnutella. At most, they testify that their filtering software was implemented on Napster's centralized composite list servers. *See* Breslin, Ikoyoye and Hyman Declaration. *Morpheus-Gnutella* DISPUTED. StreamCast does not have the ability to identify files in a Morpheus user's shared file folder, and cannot filter files based on the text of file names, based on the metadata, based on the unique hash, and/or based on commercial available "fingerprinting" technologies. Any filtering of Gnutella based versions of Morpheus are user optional and do not communicate with any StreamCast owned or operated computer. Smith Opp. Decl ¶ 68. StreamCast is not able to engage in filtering copyrighted material under the current architecture of the software. Smith Opp. Decl. ¶ 68.
(d) Defendants have the ability to prevent	DISPUTED. See StreamCast's Response to 7(c) above.

distribution of unauthorized copyrighted content through filtering based on the text of file names, based on the metadata, based on the unique hash, and/or based on commercially available "fingerprinting" technologies. Kleinrock Decl. ¶¶ 74, 76-81; Breslin Decl.; Ikezoye Decl.; Hyman Decl.; **Ex. 2** (Smith Depo. T.) 16:5-19, 17:4-8, 54:4-66:24, 90:18-91:5, 417:18-419:2, 424:17-426:4, 428:15-429:17, 430:6-10, 430:21-25, 431:1-432:6, 434:21-435:23, 476:8478:4; 479:21480:9, 5236:16-528:18; **Ex. 11**, 45844.1, 344476.1, 344476.2, MUS005522-23 [Smith Depo. Ex. 216], 545105 [Smith Depo. Ex. 2151; **Ex. 11** Smith Depo. Ex 227; **Ex. 13**, KZ001480.	
(e) As Defendants have acknowledged, mechanisms to monitor user downloads or search requests for the purpose of tracking copyrighted material have been feasible from the outset. Kleinrock Decl. ¶¶	DISPUTED. Plaintiffs misrepresent the evidence cited. StreamCast has never acknowledged that mechanisms to monitor user downloads or search requests for the purpose of tracking copyrighted material "have

71, 74-76, 79-81; Creighton Decl. ¶ 28; Bresline Decl. ¶¶ 2-22; Ikezoye Decl. ¶¶ 2-12; Hyman Decl. ¶¶ 2-8; **Ex. 1** (Griffin Depo. T.) 414:15-419:18, 414:14-22; **Ex. 2** (Smith Depo. T.) 90:18-91:5, 91:16-25, 92:23-93:2, 94:24-95:7, 417:18-419:2, 421:24-422:12, 424:17-426:4, 434:2 1-435:23, 428:15-429:17, 430:21-25, 476:8-478:4, 479:21480:9, 526:15-527:8, 527:12-528:4, 530:21-25, 532:14-23, 532:24-535:3, 535:17-536:2; 536:6-538:15; 538:22-539:19, 540:3-541:2; **Ex. 4** (Hardison Depo. T.) 111:5-112:5; **Ex. 7** (Berineister Depo. T.) 126:23-130:18, 132:15-136:22, 138:17-139:20, 158:5-159:23; **Ex 9** (Tung Depo. T.) 171:2-17; **Ex. 11**, MUS014448, MUS14525-41, 45844.1, MUS007463-68, MUS008492-97, MUS01309S-1 14, MUS013618, MUS012661-64, MUS022451, 150538, 150543, 169135, 171661 [Smith Depo. Ex. 230], 17626.1-2, 171708.1, 251318.1, 265918,	been feasible from the outset." StreamCast disputes the feasibility of any of the methods or mechanisms (which are not identified by Plaintiffs) to monitor user downloads or search requests for the purpose of tracking copyrighted material. *See* StreamCast's Responses to 7(a)-(c) above. *Morpheus-FastTrack:* DISPUTED. Plaintiffs' support for StreamCast's alleged knowledge that it was "feasible" to monitor user downloads for search requests for purposes of tracking copyrighted material is based on hearsay and speculation. However, it is clear from the evidence cited by Plaintiffs, that no such mechanisms were available to be implemented. Smith Opp. Decl. ¶ 67.

278306.1, 280699.1-24, 545105 [Smith Depo. Ex. 215], 950112, 1532397, 1570734 [Griffin Depo. Ex. 377], 1582339, 1629156, 1637675, 2100940, 2102197, 2102660, 2102464, 2103493, 2103496, 2108318, 2109022; **Ex. 11** Smith Depo. Ex. 227; **Ex. 13**, KZ000785, 1(2000847, KZ000897, KZ001209; **Ex. 14**, KVO000143, KVO000132-35, KVO000370-408; **Ex.** 15, T000048, T000063, T000079, T000167.	
(f) The KazaaLib programming guide confirms that the list of user files offered for distribution is "under its control" and the client application could "perform operations on these files, such as … disabling sharing." Kleinrock Decl. ¶67-68; **Ex. 2** (Smith Depo. T.) 417:18419:2; **Ex. 10** (Rose Depo. T.) 53:10-54:7; **Ex. 11**, 545105 [Smith Depo. Ex. 215].	*Morpheus-FastTrack*: DISPUTED. Plaintiffs have misrepresented the meaning and content of the "hearsay" document cited. The KazaaLib API programming guide states that the KazaaLib program itself, which was imbedded within the FastTrack versions of Morpheus, can perform certain operations on the files a user has made available for sharing on his or her own hard drive. The guide does not establish that StreamCast itself

	has any ability to perform operations on user files. The deposition testimony of Prof. Kleinrock, confirms this. Lapple Decl. **Ex. 6** (Kleinrock Depo. T.) 106:12-22; 110:9-22; 111:15-20; 112:12-18. The KazaaLib API programming guide confirms that StreamCast *did not* have the ability to control the core file sharing capabilities of the KazaaLib software embedded in the FastTrack versions of Morpheus. Smith Opp. Decl. ¶¶ 26-29. *Morpheus-Gnutella* DISPUTED. This fact is inapplicable to the Gnutella-based versions of Morpheus, as they do not utilize the KazaaLib program. Smith Opp. Decl. ¶ 43.
Plaintiffs' Alleged Uncontroverted Fast No. 8: Defendants do not merely distribute a software product — they operate systems and provide services. **StreamCast's Response to Plaintiffs' Alleged Uncontroverted Fact No. 8**: DISPUTED. StreamCast distributes a software program that enables peer-to-peer resource sharing. It does not own, operate, or control any "system." Although the users of this software program can join together to form a user	

defined "network," such "network" is not owned, operated, or controlled by StreamCast. Moreover, any alleged "services" provided by StreamCast do not relate in any way to the searching and file sharing functions of Morpheus, and are therefore irrelevant to the *Sony-Betamax* analysis.	
PLAINTIFFS' EVIDENCE	**STREAMCAST'S RESPONSE**
(a) Defendants' Terms of Service refer to their systems as "services" and "networks" numerous times. **Ex. 62** (Griffin Depo. Ex. 271.)	DISPUTED IN PART. StreamCast does not dispute that: (1) it provided a Terms of Service which used the words "services" and "networks" for the Fast Track versions of Morpheus, (2) certain functions it performs, such as website services, may be fairly characterized as a "service," and (3) that users of the Morpheus software can join together to form a user defined "network" (which is not owned, operated, or controlled by StreamCast). However, StreamCast disputes that distributing the Morpheus software product is a "service." StreamCast also disputes this allegation as it relates to Gnutella-based versions of Morpheus, which do not utilize a Terms of Service. Smith Opp. Decl. 45.

(b) MusicCity has described its system as "an interactive community" - "a community of users not just [a software] application like WinMX, and other similar applications." MusicCity has also described Morpheus as a "network." **Ex. 1** (Griffin Depo. T.) 466:14-467:1; **Ex. 13**, KZ1295-1308; **Ex. 11**, MUS005052, 545632; **Ex. 16**, MJT0374.	DISPUTED IN PART. StreamCast does not dispute that it has referred to users of Morpheus as a "community" or as a "network." Because Morpheus allows interaction between anonymous Internet users who join together to form a user "network," many Morpheus users experience a sense of community by such interaction. However StreamCast does not own, operate, or control such a "community" or "network." Smith Opp. Decl. ¶ 34.
(c) Defendants have operated central servers that stay in regular communication with their users' computers. **Ex. 2** (Smith Depo. T.) 117:3-119:5, 140:25-141:21, 142:9-14; 143:9-14, 143:23-144:10, 146:4-147:2; 180:14-181:3, 288:14-20, 291:8-15, 295:6-296:7, 3257-11,325:2-326:16, 328:17-329:5; **Ex. 11**, 172881 [Smith Depo. Ex. 188], 176150 [Smith Depo. Ex. 194], 544670 [Smith Depo. Ex. 155].	DISPUTED IN PART. StreamCast does not dispute that it operates central servers that are contacted by the Morpheus client at regular intervals to check for updates and tuning parameters. Further, StreamCast does not dispute that its central servers routinely send advertising to the Morpheus client. However, StreamCast disputes that these limited interactions between its central servers and the Morpheus client constitute a "regular communication." Moreover, the central servers

	operated by StreamCast do not play any function whatsoever in the searching and file sharing functions of the Morpheus client. Smith Opp. Decl. ¶ 22; Gribble Opp. Decl. ¶ 49)
(d) Users' computers receive "parameter values" from Defendants' servers. By setting parameter values, Defendants are able to tune the performance of their systems. **Ex. 2** (Smith Depo. T.) 98:16-99:8, 100:3-101:8, 108:12-19, 112:14-115:14, **Ex. 11**, 168144 [Smith Depo. Ex. 152].	NOT DISPUTED. However, the "parameter values" users of the Morpheus software receive from StreamCast's central servers have nothing to do with the searching and file sharing functions of the Morpheus software. Accordingly, this evidence is irrelevant for purposes of this Court's *Sony-Betamax* analysis.
(e) To protect against "hackers," Defendants have restricted access to their network by providing updated software with changed protocols and encryption — so that only users running the current version of the software could continue to connect to the network. Kleinrock Decl. ¶¶ 61, 63-64; **Ex. 2**, (Smith Depo. T.) 110:15-11:2, 301:23-303:25, 311:9-313:1, 314:1-25;	*Morpheus-FastTrack* DISPUTED. StreamCast incorporates herein its Response to 6(h) above. In addition, the evidence cited by Plaintiffs relating to the giFT project shows that StreamCast caused active Morpheus programs to switch from one encryption built into the source code to another encryption built into the source code in order to inhibit hackers, including hackers

317:2-319:15; 325:7-326:16, 333:12-334:8 335:20-336:19; 335:9-19, 348:7-349:24, 387:18-390:22; **Ex. 3** (Weiss Depo. T.) 606:19-608:4; **Ex. 11**, 164299, 545672 [Smith Depo. Ex. 190], 545735 [Smith Depo. Ex. 191], 176150 [Smith Depo. Ex. 194], 545901 [Smith Depo. Ex. 192], 436095 [Smith Depo. Ex. 196], 176153 [Smith Depo. Ex. 198], 437346 [Smith Depo. Ex. 201], 176156 [Smith Depo. Ex. 209].	from the giFT project, from causing computers running Morpheus to conduct a "distributed denial of service attack" on other computers. Smith Opp. Decl. ¶ 53. Even after the encryption protocol was changed, hackers from the giFT project could still cause their program to interact with other Morpheus, Grokster, and Kazaa users; the change simply inhibited the ability of these hackers to initiate a distributed denial of service attack. The ability to change encryption parameters does not give StreamCast any ability to monitor or prevent the use of Morpheus to join together to form a network, designate files for sharing, search for or download particular files. Smith Opp. Decl. ¶ 53. *Morpheus-Gnutella* DISPUTED. Because the Gnutella Network utilizes open source and standards, giFT hackers have not (and need not) attempted to hack into the Gnutella user network. StreamCast cannot alter the encryption or

	protocol of Morpheus Preview Edition and Morpheus Version 1.9. StreamCast can alter the encryption or protocol of Morpheus 2.0 only by altering the source code of the program; it cannot alter the encryption or protocol via the auto.xml file maintained on StreamCast's server. Smith Opp. Decl. ¶ 42; Gribble Opp. Decl. ¶ 48. The ability to select an encryption or protocol parameter does not give StreamCast any ability to monitor or prevent the use of Morpheus to create or join a network, designate files for sharing, select or deselect files for searching or downloading. Smith Opp. Decl. ¶ 53.
(f) Defendants have monitored and exercised control over their message boards by deleting user postings that they find objectionable. **Ex. 1** (Griffin Depo. T.) 278:11-283:15; **Ex. 11**, 151204 [Griffin Depo. Ex. 292]; **Ex. 3** (Weiss Depo. T.) 472:3475:12.	*Morpheus-FastTrack* DISPUTED IN PART. StreamCast does not dispute that it operated discussion boards at the website http://www.musiccity.com from May - August, 2001. These discussion boards were open to the public and available to anyone

	navigating to the MusicCity.com website with an Internet browser; they were not part of the Morpheus software product. Lapple Decl. **Ex. 3** (Weiss Depo. T.) 327:25-328:18. It is not disputed that StreamCast reviewed the postings on these boards prior to publishing them, and did not post messages appearing to contain "spam," or commercial solicitations, or messages from users who appeared to be attempting to communicate about the alleged availability of copyrighted content. Lapple Decl. **Ex. 3** (Weiss Depo. T.) 327:18-335:16. However, these message boards were not part of, related to, or necessary for the peer-to-peer functionality of Morpheus. Smith Opp. Decl. ¶ 60. *Morpheus-Gnutella* DISPUTED. The Gnutella-based versions of Morpheus, which were released beginning in March, 2002, do not incorporate discussion boards, which were taken down from the

	MusicCity.com website in August, 2001; prior to the March 1, 2002 release of Morpheus Preview Edition. Smith Opp. Decl. ¶ 60. The evidence cited by Plaintiffs is therefore not relevant to the Gnutella-based versions of Morpheus.
(g) Defendants provide a personalized "support" function through which they respond to specific user requests for assistance. **Ex. 1** (Griffin Depo. T.) 284:3-288:5; **Ex. 11**, 136668 [Griffin Depo. Ex. 314], 136716 [Griffin Depo. Ex. 313], 136760 [Griffin Depo. Ex. 312], 136945 [Griffin Depo. Ex. 315], 136947 [Griffin Depo. Ex. 316], 137081 [Griffin Depo. Ex. 317], 137925 [Griffin Depo. Ex. 320], 145427 [Griffin Depo. Ex. 318].	DISPUTED. The evidence cited by Plaintiffs in support of this alleged fact shows, at most, that StreamCast (like many other software vendors and consumer product companies) offered its users an email address (info@MusicCity.com) where they could send general requests for information, and that StreamCast occasionally responded to such requests. However, this evidence can hardly be characterized as providing a "personalized" support function.

Plaintiffs' Alleged Uncontroverted Fact No. 9:

Defendants maintain a continuous relationship with their users.

StreamCast's Response to Plaintiff's Alleged Uncontroverted Fact No. 9:

DISPUTED.

PLAINTIFFS' EVIDENCE	STREAMCAST'S RESPONSE
(a) Defendants operate central servers that stay in constant communication with their users' computers. **Ex. 2** (Smith Depo. T.) 117:3-119:5, 140:25-141:21, 142:9-14, 143:23-144:10, 146:4-147:2; 180:14-181:3, 288:14-20, 291:8-15, 295:6-296:7, 325:7-11, 328:17-329:5; **Ex. 11**, 172881 [Smith Depo. Ex. 188], 176150 [Smith Depo. Ex. 194], 544670 [Smith Depo. Ex. 155].	DISPUTED IN PART. StreamCast does not deny that it has operated, and continues to operate, central servers. However, StreamCast denies that its central servers "stay in constant communication" with the Morpheus user's computer. The central servers operated by StreamCast are contacted at regular intervals by the Morpheus client to obtain information on potentially available updates, and information regarding tuning parameters. In addition, the central servers operated by StreamCast provide advertisements to the Morpheus client. However, StreamCast's central servers do not play any function whatsoever in the searching and file sharing functions of Morpheus. Smith Opp. Decl. ¶ 222 Gribble Opp. Decl. ¶¶ 4, 31, 33, 40, 41, 42. In fact, it is undisputed that users of Morpheus could continue to

	search for and share files even if StreamCast's central servers were disabled. Smith Decl. ¶ 23.
(b) Defendants continuously stream advertising into their users' computers while the users are logged on to Defendants' systems. **Ex. 2** (Smith Depo. T.) 291:8-12, 293:4-294:19, 298:11-19, 490:13492:18; **Ex. 11**, 545568 [Smith Depo. Ex. 167].	NOT DISPUTED. However, this fact is irrelevant and does not establish a "continuous relationship" between StreamCast and Morpheus users for purposes of the *Sony-Betamax* analysis.
(c) Defendants periodically issue updated versions of their software to users. **Ex. 2** (Smith Depo. T.) 147:3-19, 222:2-225:23, 228:2-17, 238:18-239:7, 239:8-23, 244:2-10, 333:12-334:8, 512:3-513:6, 523:22-524:23; **Ex. 11**, 168207 [Smith Depo. Ex. 156], 168283 [Smith Depo. Ex. 171], 168295 [Smith Depo. Ex. 172], 172745 [Smith Depo. Ex. 173], 436095 [Smith Depo. Ex. 196].	NOT DISPUTED. Like software vendors generally, StreamCast update and periodically makes available new versions of its software which users may freely download. However, this fact does not establish an ongoing relationship with the user for purposes of the *Sony-Betamax* analysis.
(d) Users' computers receive "parameter values" from Defendants' servers. By	NOT DISPUTED. However, the "parameter values" users of the Morpheus software

setting parameter values, Defendants are able to tune the performance of their systems. **Ex. 2** (Smith Depo. T.) 98:16-99:8, 100:3-101:8, 108:12-19, 112:14-115:14; **Ex. 11**, 168144 [Smith Depo. Ex. 152].	receive from StreamCast's central servers have nothing to do with the searching and file sharing functions of the Morpheus software. Accordingly, this evidence is irrelevant for purposes of this Court's *Sony-Betamax* analysis.
(e) Defendants "auto upgrade" user software by transmitting messages to users' computers that a new version of the software is available for the users to download. **Ex. 2** (Smith Depo. T.) 98:16-99:8, 106:9-107:___, 108:12-19, 116:5-20, 257:2-9; **Ex. 11**, 168144 [Smith Depo. Ex. 152], 168207 [Smith Depo. Ex. 156].	*Morpheus-FastTrack* DISPUTED. If a user launched a FastTrack version of Morpheus and logged in to StreamCast's "kazaaserver," the kazaaserver would then determine whether an updated version of Morpheus was available. If an updated version of Morpheus was available, the "kazaaserver" would then send a notification message to the user, via the Internet and Microsoft's Internet Explorer, informing the user interface that a new FastTrack version of Morpheus was available for download. However, all of these upgrades were optional. Smith Opp. Decl. ¶ 85. This process of sending update notifications was an automated process not unlike

	the automated process carried out by many other software vendors, such as virus protection software vendors. Smith Opp. Decl. ¶ 85. StreamCast disputes that these automated update notifications constitute a "regular communication" with the user. *Morpheus-Gnutella* DISPUTED IN PART. Morpheus Preview Edition and Morpheus 1.9 do not provide update notifications. Smith Opp. Decl. ¶ 38. Although Morpheus 2.0 does provide update notifications, all of these updates are optional for the user.
(f) Defendants are able to effect "forced upgrades" of their user software, after which users running outdated versions of the software will no longer be able to access Defendants' systems. **Ex. 2** (Smith Depo. T.) 47:3-19, 54:4-55:9, 56:19-57:6, 369:22-370:13; **Ex. 11**, 168207 [Smith Depo. Ex. 156], 265960 [Smith Depo. Ex. 148].	DISPUTED. StreamCast does not have the ability to effect "forced upgrades" of the Morpheus software. In fact, the testimony relied on by Plaintiffs demonstrates exactly the opposite. Like software vendors generally, StreamCast updates and periodically makes available new versions of its software which users may freely choose to download. Smith

	Opp. Decl. ¶ 39. While StreamCast strives to improve its software with each new version and encourages Morpheus users to update their software, it has no ability to "force" Morpheus users to update their software. Smith Opp. Decl. ¶¶ 39-42; Gribble Opp. Decl. ¶¶ 47-48. Prof. Kleinrock admitted as much at his deposition. Lapple Decl. **Ex. 6** (Kleinrock Depo. T.) 117:6-23. *Morpheus-FastTrack* DISPUTED. The evidence cited by Plaintiffs uncontrovertibly demonstrates that StreamCast *could not have* required users of these versions to upgrade to new versions of the software application. While Morpheus was based on the FastTrack architecture, StreamCast never required Morpheus users to upgrade as a condition for connecting to other Morpheus users as an upgrade was always an option for users. Smith Opp. Decl. ¶ 40. Users of outdated Morpheus software versions

	can and do still connect with other users of similar outdated versions. Smith Opp. Decl. ¶ 40. This is because updates of these versions of Morpheus did not change networking protocols such that users running different versions of software could continue to connect to other users running similar versions. Smith Opp. Decl. ¶ 40. Even with Kazaa altered the peer-to-peer source code to cause subsequent versions of Morpheus to be incompatible with previous versions, the previous versions were fully operative, including their file sharing functions, "indefinitely." Lapple Decl. **Ex. 2** (Smith Depo. T.) 336:20-25. It is not disputed that in February, 2002, Kazaa made an update available to users of Kazaa and Grokster with networking protocols which were different from the networking protocols of the Morpheus version. Because Kazaa did not make this update available to StreamCast, users of the then-current version of Morpheus (version 1.3) no

	longer could connect to Grokster and Kazaa clients or to supernodes. StreamCast thereafter redesigned the file-sharing protocols for its Morpheus software to incorporate the publicly available and pre-existing open-source Gnutella protocols in Morpheus "Preview Edition." Smith Opp. Decl. ¶ 43. *Morpheus-Gnutella* DISPUTED. Plaintiffs fail to submit any evidence supporting the allegation that the versions of Morpheus based upon Gnutella enable StreamCast to require users to "upgrade to a new version of the client application as a condition of users' continued ability to connect to the [Gnutella] network." The sole evidence which Plaintiffs do submit confirms the fact that StreamCast has no ability to require that its users "upgrade" to new software versions as a "condition" for accessing the Gnutella user network. Indeed, StreamCast could not require users to accept an upgrade. Lapple

	Decl. **Ex. 2** (Smith Depo. T.) 514; 1-11; Smith Opp. Decl. ¶ 39; Gribble Opp. Decl. ¶¶ 46-48. Because the Gnutella user network recognizes the protocols standard to these Gnutella-based versions of Morpheus, any and all upgrades to Morpheus since Morpheus switched to the Gnutella user network in March of 2002 have not affected a user's ability to connect to the Gnutella user network using older versions of Morpheus. Smith Opp. Decl. ¶ 39. Furthermore, requiring a user to accept a download presents intractable problems of security, trust, privacy, and performance. Lapple Decl. **Ex. 5** (Gribble Depo. T.) 110:12-115:5.
(g) In Defendants' systems based on FastTrack, Defendants have been able to update and change the list of supernode addresses relied on by users. Defendants have been able to do this both by revising the embedded supernode list contained in successive versions of their software, and by issuing	DISPUTED. StreamCast has never selected or imbedded any Internet addresses of any supernodes in client software provided to users. StreamCast also has never updated any list of supernode addresses in any of the FastTrack versions of Morpheus. This was done, if at all, by Defendant Kazaa,

specific commands to user's computers **Ex. 1** (Griffin Depo. T.) 253:17-254:11, 257:7-258:8.	and was not at the request or under the control of StreamCast. Smith Opp. Decl. ¶ 21. The deposition testimony cited by Plaintiffs of Steve Griffin refers to actions that were taken by Kazaa, not StreamCast. Moreover, this alleged fact is inapplicable to the Gnutella-based versions of Morpheus, because they do not use supernodes. Smith Opp. Decl. ¶ 43.
(h) Defendants provide their users with periodic newsletters, which update the users as to Defendants' newest features. **Ex. 5** (D. Rung. Depo. T.) 122:7-123:1; **Ex. 12**, GR10594-97.	DISPUTED. The evidence cited by Plaintiffs relates only to Grokster, and does not show that StreamCast has provided Morpheus users with such periodic "update" newsletters.
(i) Defendants provide an ongoing "support" function through which they respond to specific user requests for assistance. **Ex. 1** (Griffin Depo. T.) 284:3-288:5); **Ex. 11**, 136668 [Griffin Depo. Ex. 314], 136716 [Griffin Depo. Ex. 313], 136945 [Griffin Depo. Ex. 315], 136947 [Griffin Depo. Ex. 316], 136760 [Griffin Depo.	DISPUTED. The evidence cited by Plaintiffs in support of this alleged fact shows, at most, that StreamCast (like many other software vendors and consumer product companies) offered its users an email address (info@MusicCity.com) where they could send general requests for information, and that StreamCast occasionally

Ex. 312], 137081 [Griffin Depo. Ex. 317], 137925 [Griffin Depo. Ex. 320], 145427 [Griffin Depo. Ex. 318].	responded to such requests. However, this evidence can hardly be characterized as providing an "ongoing" support function.

Plaintiffs' Alleged Uncontroverted Fact No. 10:

Defendants' systems were and are designed to infringe copyrights.

StreamCast's Response to Plaintiffs' Alleged Uncontroverted Fact No. 10:

DISPUTED.

PLAINTIFFS' EVIDENCE	STREAMCAST'S RESPONSE
Defendants have continued to operate and make improvements to their systems with knowledge that those systems are used for large-scale distribution and reproduction of copyrighted works.	*See* StreamCast's responses to sections 3(c), 3(e), 3(f), 3(g), 3(l), 3(n), 3(q), 4(o), 5(f), 6(l) above.

RESPONSES TO PLAINTIFFS' ALLEGED CONCLUSIONS OF LAW

Plaintiffs' Alleged Conclusion of Law No. 1:

Users of Defendants' systems infringe Plaintiffs' copyrights by engaging in, *inter alia*, the unauthorized reproduction and distribution of Plaintiffs' works in violation of 17 U.S.C. § 106(3).

StreamCast's Response to Plaintiffs' Alleged Conclusion of Law No. 1:

DISPUTED. Plaintiffs have failed to prove, as a matter of law, any direct infringement by any particular user of the Morpheus software product. *See* StreamCast's Response to Plaintiffs' Alleged Uncontroverted Fact No. 2 (and StreamCast's Responses to all subfacts contained therein.)

Plaintiffs' Alleged Conclusion of Law No. 2:

Defendants' MusicCity, Grokster, and Kazaa have engaged in and are liable to Plaintiffs for copyright infringement under the doctrines of contributory infringement and vicarious infringement.

StreamCast's Response to Plaintiffs' Alleged Conclusion of Law No. 2:

DISPUTED. Plaintiffs have failed to prove, as a matter of law, all of the elements of their claims for contributory and vicarious copyright infringement. *See* StreamCast's Response to Plaintiffs' Alleged Uncontroverted Facts Nos. 3, 4, 5, 6, and 7 (and StreamCast's Responses to all subfacts contained therein). Moreover, Plaintiffs have failed to prove, as a matter of law, that StreamCast does not qualify for the protections from liability afforded it by the *Sony-Betamax* decision. *See* StreamCast's Responses to Plaintiffs' Alleged Uncontroverted Facts No. 8, 9, and 10 (and StreamCast's Responses to all subfacts contained therein).

Plaintiffs' Alleged Conclusion of Law No. 3:

The "Staple article of commerce" defense to liability for contributory infringement, *See Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417 (1984), is inapplicable to Defendants' conduct. That defense is without merit, and does not bar Plaintiffs' claim for contributory copyright

infringement.

StreamCast's Response to Plaintiffs' Alleged Conclusion of Law No. 3:

DISPUTED. Plaintiffs have not disputed that the Morpheus software product is a "staple article of commerce" and is capable of substantial noninfringing uses. Moreover, Plaintiffs have failed to prove, as a matter of law, that StreamCast does not qualify for the protections from liability afforded it by the *Sony-Betamax* decision. *See* StreamCast's Responses to Plaintiffs' Alleged Uncontroverted Facts No. 8, 9, and 10 (and StreamCast's Responses to all subfacts contained therein).

Plaintiffs' Alleged Conclusion of Law No. 4:

Pursuant to U.S.C. § 505, Plaintiffs are entitled to recover their costs, disbursements, and reasonable attorneys' fees associated with this action.

StreamCast's Response to Plaintiffs' Conclusion of Law No. 4:

DISPUTED. Plaintiffs have failed to prove their claims, as a matter of law, and are therefore not entitled to such a recovery. Moreover, Plaintiffs have failed to submit any evidence whatsoever to prove the amount and reasonableness of their costs, disbursements, and attorney's fees associated with this action.

Dated: October 21, 2002

Respectfully submitted,

By /s/

Charles S. Baker

Brobeck, Phleger & Harrison LLP Defendants MusicCity.com, Inc. (now known as StreamCast Networks, Inc.) and MusicCity Networks, Inc.

Deposition of
Darrell Smith
August 27, 2002

* * * *

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* * * *

Q. Do you recall what information you gave him about this concept?
A. Not in particular other than it's something that's physically possible.
Q. You told them it was physically possible to do this?
A. Yes.
Q. In order to tie in advertising and promotions with specific music file downloads you would have to know which files had been downloaded; isn't that true?
A. The thing that you would really have -- the biggest thing that you would have to have is the ability of changing in the software, which most of the things that he presented to me as questions I told him could not be done but it was something that KaZaA could have done.
MR. FABRIZIO: Can you read back that

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answer, please.

(The requested testimony was read by the court reporter.)
BY MR. BAKER:
Q. Let me focus on the last part of that. When you told him that it could not be done but it was something that KaZaA could have done,

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what distinction are you trying to draw?
A. The fact that we did not write or control the functionality of the Morpheus/KaZaA software, and any time Mike Weiss wanted any form of potential enhancement or addition to the software, that he would have to speak directly with KaZaA for implementation [sic].
Q. That relates, I think, then, to my question, the first part of it. You said something about changing the software.
Does that mean that these things could have been done with changes to the code, and KaZaA could have implemented those changes but not MusicCity?
A. That is correct.
Q. How would KaZaA have changed the code in order to allow advertising and promotions to be tied

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to specific music file downloads?
A. They had a mechanism that Niklas told me about, the CEO of KaZaA, that allowed them to take a search query and send it to multiple areas of the application for further processing if they wanted. And they had demonstrated that in their client application overseas by taking search results and sending those to Amazon.com overseas.
Q. Did you actually observe a demonstration of their technology in operation?
A. In regards to which functionality of it?
Q. The one you just described.
A. Oh, yes, I had.
Q. When did you see that?
A. Approximately April of 2001.

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Q. Did it appear to work?
A. Yes, it did. And when I witnessed that it was using -- it wasn't using the Morpheus, it was using the actual KaZaA application.
Q. So the demonstration you witnessed was with the KaZaA/FastTrack client application?
A. Yes; that is correct.
Q. Not with the Morpheus/FastTrack client application?
A. That is correct.

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Q. Okay. You could have asked KaZaA to implement that feature into the Morpheus/FastTrack client application; is that not correct?
A. Yes, we could have requested that of them.
Q. There was no technological impediment to doing so?
A. No.

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Deposition of
Darrell Smith
August 28, 2002

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Q. As a practical matter the overwhelming majority of the network upgraded to Version 1.3.3 and responds to the pop-up box that we see in Exhibit 196?
A. Yes.

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Q. Has MusicCity issued more than one version of the Morpheus 2 version of the client

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application? In other words, has there been a 2.1, a 2.1.1, a 2.2?
A. Yes.
Q. How many versions have been issued?
A. Sixteen.
Q. Sixteen? Over what period of time?
A. Five days.
Q. Without going into the cause of each additional version, can you speak generally as to why those versions needed to be issued?
A. Jtella was majorly broken.
Q. And these versions were intended to correct problems with Jtella?
A. That is correct.
Q. Were the problems with Jtella affecting the performance from the user perspective?

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Deposition of
Darrell Smith
October 30, 2002

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Q. What is it in paragraph 41 that you'd like to modify or change?
A. Is the fact that it is possible to, in essence, force an upgrade -- or not an upgrade, but force an application or something that's been downloaded to execute.

Q. Let me clarify.
There is a sentence in paragraph 41, the last sentence that reads, "After considering this matter further, and talking to a technologist at our partner company that assists us with the update process, I have come to the conclusion that it is not possible to force a user of Morpheus 2.0 to accept an upgrade against his or her will."
Is that the sentence you were referring to?
A. That's correct.
Q. And your testimony today is that that sentence is no longer true?
A. That is correct.
Q. So as you sit here today under oath, it is your testimony that it is possible for MusicCity to force a user of Morpheus 2.0 to accept an upgrade against his or her will?
A. I wouldn't consider it as an upgrade. It basically is to execute or basically download any

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application, any software, whether it's Morpheus or anything else.
Q. That's a good clarification. Let me put the question again. And let me give a little backup so we can have some context for the record.
We have previously talked about the auto XML files that are on the Web server on MusicCity's server; correct?
A. Yes.
Q. And the versions of the auto XML that we looked at, there were three auto upgrade segments; correct?
A. That's correct.

Q. One of them was for the Media Manager application?
A. Yes.
Q. One of them was for the PalTalk or Chat application?
A. That's correct.
Q. And one of them as currently configured was for an upgrade to the Morpheus Client application?
A. That's correct.
Q. Okay. I refer to each of those as auto download segments. Is that a fair term?
A. That's correct. The only difference is,

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it's used for an -- the one that had to do with Morpheus can be used for updating Morpheus, but the application itself doesn't know that that's specifically Morpheus that's being updated.
Q. That was my question.
Regardless of which segment we're talking about, rather than referring to this as an auto upgrade, it's proper to refer to it as an auto download because the client application doesn't care and doesn't know what the contents of the file it's downloading are?
A. That is correct.
Q. So it could be an upgrade to Morpheus 2.0; correct?
A. That's correct.
Q. It could be an entirely different application?
A. That's correct.
Q. It could be essentially any binary code that MusicCity chose to download to its users?

A. That's correct.
Q. Okay.
A. Now, the main reason that 41 is different is the technologists that I consulted with were originally wrong on their assessment.

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Q. I was going to get there. I wasn't questioning your credibility on this. I was trying to proceed so that the record is just clear.
So with the clarifications we've just discussed in mind, let me put the question this way.
Today, under oath, it is a fact that it is possible for MusicCity to force a user of Morpheus 2.0 to accept the download of any application of MusicCity's choosing, whether that is an upgrade to Morpheus 2.0 or any other application, against that user's will; isn't that correct?
A. Not necessarily. The code has the ability to force the execution, or basically force the download and then tell the operating system to execute that program.
But from that point, it depends upon that program's ability to be able to actually do the actual upgrade or changing of Morpheus. In example, if a piece of code is sent down and Morpheus refuses to allow itself to be overwritten and shut down, then that would possibly fail.
Q. Under what circumstances would Morpheus refuse to allow itself to be overwritten?
A. Like an in example, right now, if I remember correctly, let's say you have a program

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that's running in memory; another program starts. It's feasible to have the program that was already running not allow itself to be terminated and shut down to be overwritten.

Q. When you say "feasible," now we're talking in sort of a metaphysical sense?

A. That's correct.

Q. You have no expectation that if MusicCity attempted to upgrade the client application in the process we've just been discussing that the existing client application would in any way reject or refuse to allow itself to be overwritten, do you?

A. It's possible that that could happen.

Q. You don't have any expectation that it would happen?

A. I am not positive either one way or the other. It's possible that it could happen. But the part that is 100 percent determined, and that is the fact that it is possible to download, without the user being able to do anything about it, another executable program that can then execute on their computer after the completion of that download.

Q. Okay. So let me put the question, then, again.

As you sit here today, it's your testimony

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under oath that MusicCity has the ability to force users of Morpheus 2.0 to accept the download -- strike that.

Go down the same path.

As you sit here today, it's your testimony under oath that MusicCity has the ability to have any

application of its choosing automatically download onto a Morpheus 2.0 user's computer and automatically execute and install on that user's computer without giving that user an opportunity to accept or decline the download or the installation; correct?

A. I agree with everything up to the point of "execute." What happens after that executes, I will not verify it one way or the other on what would happen after that. It will execute, but what it does during that execution is a completely different process.

Q. And that's because the program that has downloaded itself might contain any number of instances where it would ask the user to accept or decline or to agree to terms of service or to any other -- it might give other dialogue boxes?

A. Plus it might not have the ability to shut down the version of Morpheus that's running depending upon the operating system.

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Q. That wasn't the question, though.

A. But in the question, you mentioned where it would force an upgrade or an install.

Q. Okay. I think that wasn't my question, so let me put it to you this way. Let's deal with the "auto execute."

There's no question that MusicCity has the ability by changing a parameter in the auto XML file to cause a program that has downloaded to automatically begin execution without prompting the user to accept or decline that installation; is that correct?

A. That's correct.

Q. Okay. In the program that has downloaded itself, MusicCity can choose to have within that program a prompt for the user?
A. That is correct.
Q. MusicCity could also choose within the program that has just downloaded not to have any-- further prompts for the user?
A. That's correct.
Q. Okay. So MusicCity could choose, by virtue of the program it's offering to download and by making the modifications to the auto XML file, to have a file that it has downloaded to a user's computer execute

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and install automatically without giving the user any dialogue prompts to accept or decline; isn't that correct?
A. Execute and attempt to install, that would be correct.
Q. All right. I'm not understanding the distinction you're trying to draw.
A. Because install -- let's say that you're installing something and you're trying to write over an existing file that's already in memory.
Q. Let me stop you.
A. Yes.
Q. That's where I think we're getting confused. My question was not write over an existing file that's already in memory. My question was just simply --
(Brief interruption.)
Q. -- a program that was downloaded would execute and install automatically?
A. The only -- that's 100 percent yes, but not

100 percent if it happens to be the same program that's already running.
Q. Okay. So the point that you are not prepared to swear to right now is that, if it's an upgrade to the existing client application, there is a

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theoretical possibility in your mind that the existing application would resist being overwritten by the newly downloaded program?
A. That's correct.
Q. Okay. What is the basis for your belief?
A. Because I've seen it happen with other applications before.
Q. What other applications?
A. Let me think for a second.
I've seen it happen with some Microsoft applications. I've seen it happen with applications that we've had in the past from third parties, as far as things like the Chat and Instant Messaging applications.
Q. Any other times you've seen this happen in your career as a technologist?
A. There's numerous times, but I don't remember each of those specific instances. But the ones that come to mind are things like the PalTalk application.
Q. Have you ever seen it happen with any version of Morpheus?
A. No, because there hasn't been that many upgrades or rewriting of the files for Morpheus.
Q. And by "Morpheus," I mean Morpheus whether

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it was under the Gnutella platform, under the FastTrack platform, or the client application that MusicCity offered when it was running and open?
A. That's correct.
The previous versions of Morpheus that fell under Gnutella, a user would explicitly have to shut off that application, because if you tried reinstalling it, there would be problems while -- if the program was currently running.
In the current version of Morpheus, when you do an install, if the user does not shut off Internet Explorer, Internet Explorer also has the ability to cause problems and cause the install to fail.
Q. How many times has MusicCity upgraded Morpheus on the Gnutella platform since it launched?
A. 2.0 or --
Q. 2.0.
A. There was somewhere in the area of -- within the first two weeks, there was almost 10-plus different versions. Since then, the number of updates, if I'm recalling properly, it's only been about two.
Q. Okay. Have any of them --
A. And none of them have been -- and the most

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recent was an update to the software, but it's not updating older versions of the software. Individuals have to redownload the application from download.com.
Q. Well, in terms of this issue you have mentioned about the existing application resisting being overwritten, what difference does it make

whether they're downloading the entire application or an upgrade to the application?
A. Because there's no such thing as an upgrade to the application. Anytime that Morpheus has ever been, as far as 2.0 specifically, has ever been upgraded, the user, in essence, redownloaded the original application with the full install.
Q. Okay. What happened to the existing one?
A. And the existing one would basically be -- all of the existing files, whether it's Instant Messenger, Morpheus, so on and so forth, would be overwritten just like it was a new install.
Q. And all of those times where that has happened, are you aware of any instance where the existing application resisted being overwritten?
A. Yes.
Q. When was that?
A. I've heard and I also have witnessed where the install has failed due to issues with versions of

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the operating system and Internet Explorer running at the same time. That's why there's a prompt in the install that basically requests the user to shut down Internet Explorer.
Q. Well, a user can be using the Morpheus 2.0 application without running Internet Explorer; correct?
A. They can. But most of the time, there's -- actually, no. That's actually impossible. The part that makes that complicated is IE is also embedded inside of Morpheus.
Q. Yeah, I understand.
A. And it works -- it works a little bit

different.
Q. But when you talked about before that you're aware of an instance where the application resisted being overwritten -- it was an instance where IE, Internet Explorer, was operating -- you weren't talking about the Internet Explorer that's actually built into the application, were you?
A. No. I was talking about the regular IE from Microsoft with their interface.
Q. A separate instance, a separate application being opened and running?
A. That's correct.

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Q. Okay. So you are aware of a potential anomaly where a user has both a separate application of Internet Explorer open, as well as the Morpheus 2.0 application open whereby it has occurred that the Morpheus 2.0 application has resisted being overwritten with an upgrade?
MR. BAKER: Let me just object to the term "anomaly." I think it mischaracterizes his testimony.
Go ahead.
THE WITNESS: Here's --
Q. BY MR. FABRIZIO: I'd like an answer to my question.
A. Could you repeat just the last paragraph?
Q. No. I'll read it again. I think I can read it off your screen.
So you are aware of a potential anomaly where a user has both a separate application of Internet Explorer open, as well as the Morpheus 2.0 application open whereby it has occurred that the Morpheus 2.0 application has resisted being

overwritten with an upgrade?
MR. BAKER: Same objection.
Go ahead.
THE WITNESS: My answer to that is yes.
Q. BY MR. FABRIZIO: Is that a common

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occurrence in your experience?
A. From what I'm hearing, it is common.
And what you were mentioning, as far as the likelihood of Internet Explorer being running that's not the Internet Explorer that's inside of Morpheus is highly likely because the marketing department of StreamCast is pushing pop-ups very vigilantly. And with those pop-up ads, those pop-ups come up in a version of IE that's the Microsoft browser, not the one in Morpheus.
And they also have pop-under campaigns, which means that the Internet Explorer application will pop up on the screen, but underneath Morpheus, where the user cannot see it until they exit the application.
Q. So how many instances are you aware of where a Morpheus 2.0 application has resisted being overwritten by a Morpheus-prompted upgrade because a separate application of Internet Explorer happened to be open?
A. I've -- personally, I know of about three instances. How many in the world in general, I would not know.
Q. You personally know of three instances?
A. Yes.

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Q. What are those three instances?
A. They were three instances where I actually saw it happening on a computer myself.
Q. What computer was that?
A. It was basically an XP machine with the current version of IE.
Q. And you were personally downloading an upgrade?
A. I was basically on -- one machine was an install, instead of going through the update process from download.com, and then the other two were basically watching the update with an old version that was updating to a newer version through the update process, through the XML file.
Q. So these all occurred in testing environments where you were doing some testing?
A. The difference between testing environment? These were just standard PC, the versions coming off of download.com or the versions -- they weren't internal experimental versions.
Q. What was the purpose of your doing the upgrade?
A. Basically, there wasn' because the upgrade just happens. I wasn't electing for the upgrade to happen.

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The fact that when you turn on the computer, if you start Morpheus and Morpheus goes to grab the XML file, the update's going to start happening. These were machines that had prior versions of Morpheus installed.
Q. When did this occur, these three instances?

A. The specific time, I don't recall, but it was over the last two months.
Q. And you said the update occurred automatically. What did you mean by "the update occurred automatically"?
A. Meaning that it was very -- it was older versions from around the first few weeks that we released the application, and the auto -- the auto update file, the XML file had been modified to basically bring those older versions more current.
Q. Okay. So this was a prompted update?
A. That's correct, but it wouldn't have mattered whether it was prompted or not.
Q. That was my question.
So this potential situation you've discussed where the existing application resists being upgraded occurs regardless of whether it's a prompted update or a forced update?
A. That's correct. That has no effect.

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Q. Okay. And the only times you have actually seen this occur is in times when you yourself for some purpose were upgrading on an internal MusicCity computer?
A. Yes, the computer was an internal MusicCity computer.
Q. Okay. How many user complaints has MusicCity received about this issue?
A. That would have to be a question directed to Tennessee. I haven't been in the loop on that process.
Q. Okay. So you have not seen or heard of any user complaints about this situation?

A. I've heard of it with other people in the company witnessing the same thing.
Q. Outside of MusicCity employees and people working on behalf of MusicCity inside the company, you haven't heard of any outside user having a complaint in this regard?
A. Directly, no.
Q. Okay. And I take it, as a general matter, if there are a lot of users' complaints about a particular issue that involves a technology point, you would as a CTO at least have heard about it, wouldn't you have not?

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A. Depends on how quick the information gets back to me, which is not always that prompt in the last few months.
Q. All right. So it could take some time for you to hear?
A. Yes.
Q. But ultimately you would hear about a user -- a massive user complaint about a technological problem?
A. Not necessarily always. Due to the amount of involvement World has had with this application, a certain percentage of questions, and I don't know that exact percentage, will sometimes go directly from our chief operating officer directly to World.
Q. So this is an answer that you maybe can't answer completely without reference to WorldMedia?
A. That's correct.
Q. Would you expect that an issue as fundamental as the upgrading of the client application, if there were a significant number of

user complaints or user issues regarding that upgrade, that you would likely have heard about it?
A. Not necessarily.
Like an example, it's not always determined what the issues are. Right now, there's a failure of

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installs that we know of that's in the area of about 65 percent failures that we know of right now, as far as the installs are not being completed.
And we're not 100 percent sure of all the factors that are involved there. We believe that this is probably one of them, and there's probably others. But it's not 100 percent determined at the moment.
But we do know that there's over 60 percent failures of installs. So out of every 100 Morpheus applications that are downloaded, 60 percent are not being completely installed --
Q. What does that mean?
A. -- or updated.
Q. So there are still people that are using the first version of 2.0 you put out because every subsequent installation attempt has failed?
A. We believe that to be so because -- what the heck is it? -- if there's a connection screen inside of Morpheus under the settings where you can actually go and see the versions of Morpheus clients that you're connected into, and when you go to that screen, we're seeing a large number of Morpheus clients on that screen that are the previous versions that should not be out there anymore that -- and we know that these clients can't have been -- have not

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been running for like the last six weeks nonstop, but they're still out there and they're not upgrading.
Q. Couldn't those people have simply declined the upgrade?
A. That's possible. But at the same time, the next time they run Morpheus, they are going to keep constantly being barraged with the same prompt over and over and over.
Q. It's not a barrage. Upon your initial launch of the application, you're presented with a dialogue box --
A. Yes.
Q. -- for the upgrade?
And it's certainly possible that they decline it each time?
A. But it would also be kind of illogical. And why would they decline each time considering that all versions that came out after that are substantially more stable and utilize less resources on their machine, and there's no negative press out there saying that the current versions are horrible and the original versions are great, so there's not a lot of motivation for them to do that.
Q. So your testimony is that, as a general matter and as a practical matter, people accept the

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prompted updates?
A. That's correct.
Q. Getting back to the forced updates --
A. Okay.
Q. -- as you sit here today, you cannot identify a single Morpheus user who's not otherwise an

employee of MusicCity that has had any issue with the existing application resisting being overwritten by an offered update to the application?
A. Considering that I do not communicate with the end-user, no. That is correct.
Q. Okay. So that issue aside, it's the case today that by making a change to the auto XML file, MusicCity has the ability to cause any application of its choosing to be automatically downloaded to and executed on a user's computer without ever presenting that user with an accept or decline dialogue box?
A. That is correct.
Q. Okay. And that new-found conclusion makes the last sentence of paragraph 41 of your declaration inaccurate?
A. That's correct.
Q. Okay. Look at paragraph 42 of your declaration. And the second sentence says, "I am unaware of any way in which to eliminate or bypass

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this clickthrough box."
The next sentence reads, "The only thing that might be able to be done would be to eliminate all of the text that appears within the box. However, the user would still see a clickthrough box that simply said 'yes' or 'no', without a message."
Those three sentences are likewise inaccurate?
A. That's correct.
Q. The next sentence reads, "The" -- strike that.
The next sentence of paragraph 42 of your declaration reads, "The download of a new version of

Morpheus, or an update of Morpheus 2.0, could not take place unless the user clicks the 'yes' box."

That sentence is also inaccurate?

A. That is correct.

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THE WITNESS: In regards to the network, as far as things with keeping the Chat servers functioning in the openNap days, keeping advertising functioning in the days of Kazaa and also in the days of Gnutella, the hours are in the thousands.

In regards to activities that have to do with the peer-to-peer portions of any of those networks, those numbers I'm not sure about because the overall network functionality of dealing with the Web servers and those other issues are substantially greater.

Q. BY MR. FABRIZIO: All right. When you talked about the Chat and the advertising functionings being in the thousands, those would be the Chat and advertising functions that were related to the client applications?

A. That's correct.

Q. Okay. How many hours have you and your team spent working on filtering mechanisms of any type

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to reduce copyright infringement by the users of your applications?

A. Considering that we don't have the resources and there's only 24 hours, not 72 hours, in a day, not a whole lot.

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Q. As Morpheus does, MusicCity could have

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written an application -- strike that.

So you don't need the FastTrack source code in order to write an application that would operate on the Kazaa myShare file folder?

A. That's correct.

Q. So when MusicCity was operating on the FastTrack platform, even without the FastTrack source code, you could have written an application as part of the client application that would have operated on the user's myShare folder; correct?

A. That's correct.

Q. And one of the things you could have done with this application that became part of the Morpheus client application was you could have taken the files in a user's myShare folder and perform some operation to compare them against a database of copyrighted works; is that correct?

MR. BAKER: I'm just going to object. Speculation.

Go ahead.

THE WITNESS: In theory, it would be possible and practical. Execution, it would be excessively difficult.

Q. BY MR. FABRIZIO: Technologically, it's something you could have done?

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A. Our company, no.

Q. Because you didn't have the internal skills set?
A. No, it's not the internal skills set. We didn't have the type of bandwidth that would have been necessary to handle that type of volume of activity or the amount of hardware resources or cash resources to invest into that much -- that amount of hardware.
Q. Okay. So they were business concerns that would have prevented you from being able to accomplish it in your mind?
A. Yeah, there were financial constraints.
Q. But there weren't technological constraints?
MR. BAKER: Objection. I think it mischaracterizes his previous testimony.
Go ahead.
THE WITNESS: The technological constraints would have been there also.
Q. BY MR. FABRIZIO: What would the technological constraints have been?
A. The fact that no company has actually proven that they can accurately filter and identify a global database of content.
Q. Okay. We'll get to that.

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A. Okay.
Q. What I'm really getting at is, without the FastTrack source code, MusicCity could have included sort of a separate component of the client application that extracted information from the user's share file and compared that to a database, putting aside the issue that you just raised? Technologically, you could have done that?

A. It's possible. The thing that -- the easier way would have been a third-party company. If they had a piece of software that did that, we could have included that, if it existed, with the Morpheus download that would have had the ability of doing what you're asking.
Q. Okay. And you could have done that without the FastTrack source code?
A. That's correct.
Q. Let's go to paragraph 67 of your declaration.
Okay?
A. Okay.
Q. When we spoke at your second day of deposition, I identified for you a whole series of companies in the business of file identification. Centermetrics was one of them.

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Do you recall that?
A. Yeah. It was actually at my first deposition.
Q. Was it your first day?
A. (No oral response.)
Q. My apologies. You have a better memory than me.
And of the list of companies I identified for you, Centermetrics was the only one that you had recognized and actually had investigated to some degree?
A. That's correct.
Q. Have you done anything since that deposition to further investigate any file identification company?

A. No, I have not.
Q. Have you asked the people at World, for instance, to undertake such an investigation?
A. No, I have not.
Q. Have you asked anyone to undertake such an investigation?
A. No, I have not.
Q. And you said you had one meeting with Centermetrics that's got to be almost two years ago?
A. That's correct.

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Q. You would expect that technology would evolve over the course of two years, would you not?
A. Most software companies, not majorly.
Q. Two years is not really a long period of time in the Internet World?
A. In the original Internet World, it was a lifetime. In the world of no companies -- companies not having any money nowadays, they're normally struggling just to get by. And I haven't run across too many software companies that have majorly advanced any technology over the last few years due to financial constraints.
Q. Okay. Are you aware that Centermetrics was acquired by a company called Gracenote?
A. I heard about that in the press.
Q. Okay. Have you done anything further to explore the Centermetrics or Gracenote file identification technology?
A. No, I haven't, because I've not been instructed to by the corporation I work for.

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Q. Have you taken any particular -- undertaken any particular investigation to learn of what commercial entities out there already have existing databases of sound recording metadata?
A. No, because I have not been instructed to do so.
Q. Okay. Are you aware that these companies with these databases of metadata also associate the metadata with the owners of the copyrighted work?
A. For Muze, yes.
Q. You're aware of that?
A. Yes.
Q. What about for CDDB?
A. That one I'm not positive on.

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Q. Never did anything to learn whether they did or didn't?
A. No.
Q. Because you weren't instructed by your company?
A. That's correct.
Q. And you said you're not aware of any companies that maintain databases of fingerprints; is that correct?
A. That's correct.
I didn't say that there are no companies. I said I'm not aware of any.
Q. Okay. Do you in fact believe there probably are some companies?
MR. BAKER: Objection. Asks for speculation.
THE WITNESS: As far as a data set that

would cover the vast majority of whatever the content would be, that I have no idea.

Q. BY MR. FABRIZIO: Okay. Did you ever talk to any of the companies in the market to see whether they in fact did have such a database?

A. No, because that's not the business I'm in.

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Excerpt of Deposition of
Vance Ikezoye
September 18, 2002

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MR. GELBLUM: Q. Mr. Page asked you some

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questions about looping. Do you remember that?

A. Yes.

Q. If in fact looping is done as Mr. Page described, which is by a content owner putting out a looped song to generate interest in the song, and therefore the content owner would have control of the loop, would it be feasible for the content owner to put some identifying information at the beginning or anywhere else in the looped recording, to enable Audible Magic's technology to recognize it?

A. Yes.

Q. And if that were done, would you need to do two fingerprints, in two different places?

A. No.

Q. Mr. Page also asked you some questions regarding the time it would take to do the identification, and I believe your testimony was that if there was -- if the referenced database was 3.4 million songs -- if that the current size of your database?

A. Roughly. It is probably over that now.

Q. Is that the right number to use?

A. Yes, 3.4 million.

Q. If the reference database is 3.4 million songs, you said each lookup would take about 30 seconds

25 is that right?

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1 A. Yes.
2 Q. Is that true if there is a hit in the
3 database; if there is an identification?
4 A. No. That is -- that number I quoted was if a
5 fingerprint did not match a database, and they had to go
6 through the whole database and try to find a match.
7 If there was a match, as we go through it,
8 immediately we would get a return. So that's the
9 longest it would take.
10 Q. You also said -- a couple of times, I think
11 -- that you would probably not use a database that
12 large, i.e., 3.4 millions songs, if you were implementing
13 this in a peer-to-peer system. Right?
14 A. Correct.
15 Q. Why not?
16 A. Because realistically 3.4 million consists of
17 a lot of songs that aren't even -- nobody cares about;
18 aren't traded; aren't really available. At any one
19 time, my understanding of the actual number of files
20 even traded is much, much smaller than that.
21 Q. Have you had any discussions with anybody on
22 the topic of how many different recordings are actually
23 being traded at any one time?
24 A. Yes. One data point was a network appliance
25 vendor who came to talk to us, and had said that in fact

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1 their analysis was -- this company does network
2 accelerators, so it sits on the backbone on the Internet
3 and starts to cache things.

4 What they said was that at any one time
5 actually it was less than a thousand files that were
6 actually being traded, where most of the traffic was.
7 Q. Do you have any sense, as you sit here today,
8 of how large the reference database would be -- would
9 need to be -- for implementation for a P-to-P system?
10 MR. PAGE: I object as vague and ambiguous,
11 and incomplete hypothetical.
12 MR. GELBLUM: Q. Do you have any sense of
13 how large the reference database would need to be for
14 Audible Magic's technology to effectively block trading
15 of copyrighted material in the P-to-P application?
16 MR. PAGE: Same Objection.
17 THE WITNESS: Of course it would be -- and
18 the question would be do you have a filter-in or
19 filter-out system. But if you wanted to try to track
20 the number of files that either you wanted to authorize
21 in or authorize out, my guess is it is under a hundred
22 thousand files that you would need to have in a
23 database

* * * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed Nov. 5, 2002]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

REPLY DECLARATION OF KEVIN BERMEISTER

I, Kevin Bermeister declare as follows:

1. I am the Chief Executive Officer of Altnet, Inc. ("Altnet"), a Delaware Corporation. The facts set forth herein are known to me of my own personal knowledge, and if called upon I can testify truthfully thereto.

2. Altnet utilizes the FastTrack network to distribute, on a commercial basis, various authorized types of files. Altnet is currently distributing approximately 425 different types of authorized files, including music, videos, movie trailers, and video games.

3. Approximately 300 of these authorized files are music from Cornerband, a company dedicated to promoting little known, independent musicians trying to reach larger audiences. Cornerband pays Altnet a monthly distribution fee to promote its acts.

4. Altnet also promotes authorized music of other independent artists, including JohnnyVirgil, Brooke Allison, and Barrington Levy. Brooke Allison's music is released on the independent label 2KSounds, which is distributed by EMI. In the month of October, 2002 alone, Brooke Allison

logged over 100,000 downloads via Altnet. Free downloads of songs by these artists are designed to stimulate subsequent paid sales. Altnet is currently selling authorized Brooke Allison's and Barrington Levy's songs for $0.49 each.

5. Altnet also distributes via FastTrack authorized music from Best Buy's Redline label. A single Redline artist, Noise Therapy, was downloaded 250,000 times last month alone.

6. Altnet also distributes authorized video games. These games are trial versions, which can typically be played only for a limited amount of time, after which the user is prompted to pay for a full versions, which typically sell for $20.00. Altnet distributes games created by Infogrames and other publishers which are distributed by Trymedia. We also distribute games from Macromedia's Atom Shockwave division. Altnet had distributed millions of copies of video games via FastTrack. In October alone, our distribution of Infogrames trial copies generated over 90,000 paid downloads, and more than 10 million inquiries. Just over the last weekend, the video game Roller Coaster Tycoon sold 250 individual games over Altnet.

7. Altnet is also distributing authorized movie trailers for major motion pictures via FastTrack. For example, we distributed authorized trailers for the major motion picture "Rules of Attraction," from Lion's Gate Studios. Altnet is paid a distribution fee for these trailers, which are designed to stimulate viewers to then go see the movie. The "Rules of Attraction" project was funded by Microsoft, which used the trailers as a vehicle to promote the latest version of their Windows Media software. Accordingly, we optimized a high quality version of the trailer best viewed in MS Windows Media Version 9. Altnet also distributes authorized documentaries from Palm Pictures.

8. The foregoing is just a sample of the many current authorized, commercial uses of peer-to-peer filesharing by FastTrack users. Altnet is at the forefront of this rapidly expanding market, and we expect that such uses will continue to grow as we go forward.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 4th day of November, 2002 at Woodland Hills, California.

/s/

KEVIN BERMEISTER

EXCERPT OF DEPOSITION OF
ELLIS HOROWITZ
October 25, 2002

• • • •

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On page 21, d, e and f.
And g and h.
Q. Okay.
Let's discuss the start.musiccity.com server which is identified in Paragraph 52-a.
A. Okay.
Q. Does the start.musiccity.com server give StreamCast the ability to control what files a user searches for with Morpheus 2.0?
MR. BORKOWSKI: Objection. Vague, ambiguous. Calls for legal conclusion.
THE WITNESS: No, it doesn't.
MR. LAPPLE:
Q. Does that server give StreamCast the ability to control the files that a user makes available for others to download?
MR. BORKOWSKI: Same objection.
THE WITNESS: Yes, yes. Through the auto.XML file, it can have an effect on the files that a user can download.
MR LAPPLE:
Q. Maybe I didn't use the right terminology.
I'm talking about the files that a user wants to make available for others to download in their shared folder.

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A. No.That server will not affect what the user

wants to -- Let's see. Upload, it could.
Yes, it could have an effect.
Q. How?
A. For example, there is a tag in the auto.XML called "ALLOW_FIREWALL_TESTING." And if the user is behind a firewall, it turns off firewall testing, or the user will not be able to share files.
Q. Any files at all?
A. Right.
Q. Is there a way that this auto.XML file could selectively prevent particular files from being uploaded?
A. No.
Q. Does the start.musiccity.com server give StreamCast any ability to control the files that a Morpheus user chooses to download?
MR. BORKOWSKI: Objection to the extent it calls for a legal conclusion.
THE WITNESS: Though it would obviously not prevent the user from typing in the name of a file that they wish to download, they could, by altering parameters in the auto.XML file, essentially make the search impossible to carry out.
MR. LAPPLE:

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Q. How?
A. It could, for example, change the XML update frequency to such a low number that the program would be consumed with contacting the start.musiccity.com server and have no cycles left over for doing a search.
Q. That would prevent any search at all; correct?
A. Correct.
Q. What you just suggested would make the

Morpheus 2.0 software inoperable for its intended purpose?
MR. BORKOWSKI: Objection. Calls for speculation, lacks foundation.
THE WITNESS: What is its intended purpose?
MR. LAPPLE:
Q. It would make -- Well, is the thing you just described in terms of eliminating the number of cycles or using up the cycles in terms of contacting the start.MusicCity.com server, that would prevent Morpheus 2.0 from doing anything at all other than contacting the start.musiccity.com server; right?
A. Correct.
Q. So for all intents and purposes, the software would be unable to do anything as far as the user was concerned, right?
MR. BORKOWSKI: Vague and ambiguous.

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THE WITNESS: Yeah. Nothing significant. There might be some user interface movements it would respond to.
MR. LAPPLE:
Q. Is there any way that you know of that this start.musiccity.com server can give StreamCast the ability to prevent a user from downloading a particular file?
MR. BORKOWSKI: May call for speculation.
THE WITNESS: Are you asking whether that is true currently or might be true in the future?
MR. LAPPLE:
Q. Let's do currently first.
A. Currently, I don't believe there is any ability to monitor specific files.

But of course, such a capability could be inserted into the software and could be carried out by start.musiccity.com.
Q. How?
A. Sorry?
Q. How?
A. I reference in my declaration, starting on page 24, a system adopted by Kazaa for checking viruses, and make the point that MusicCity could effectuate a similar type of program where the content was screened.

* * * *

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Q. What was it?
A. I have looked at essentially the URLs which would be invoked when an ad banner was clicked. The software was called event.ng.
Q. What language was it written in?
A. I don't know.
Q. You looked at the search code?
A. No. I looked at the URL. It included the reference to it.
Q. In the class you teach where the students have to install Apache, do they have to do any assignments relating to searching of web ad banners?
A. It is an exercise.
Q. What is that exercise?
A. To essentially write a program that will download that has ad banners available, then write server side programs that pull the ad banners down at some regular interval.
Q. Does the server ads.musiccity.com give StreamCast any ability to control the searches that a Morpheus 2.0 user runs?
MR. BORKOWSKI: Object to the extent it calls for a

legal conclusion.
THE WITNESS: No.
MR. LAPPLE:

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Q. Does the ads.musiccity.com server give StreamCast any control over a user's ability to make the file available for someone else to download and put it in their share folder?
A. No.
MR. BORKOWSKI: Object to the extent it calls for legal conclusion.
MR. LAPPLE:
Q. Does the ads.musiccity.com server give StreamCast any control over the files that a user, Morpheus 2.0 user, chooses to download from others?
MR. BORKOWSKI: Object to the extent it calls for legal conclusion.
THE WITNESS: No.
MR. LAPPLE:
Q. 52-c, which is the server webservice.musiccity.com, does the server webservice.musiccity.com give StreamCast any ability to control the files that a Morpheus 2.0 user searches for?
MR. BORKOWSKI: Object to the extent it calls for a legal conclusion.
THE WITNESS: No.
MR. LAPPLE:
Q. Does the server webservice.musicity.com give

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StreamCast any ability to control the files that a

Morpheus 2.0 user chooses to make available for others to download?
MR. BORKOWSKI: Object to the extent it calls for legal conclusion.
THE WITNESS: No.
MR. LAPPLE:
Q. Does the server webservice.musiccity.com give StreamCast any ability to control the files that a Morpheus 2.0 user chooses to download themselves?
MR. BORKOWSKI: Objection to the extent it calls for legal conclusion.
THE WITNESS: No.
MR. LAPPLE:
Q. 52-d, which is a server that is identiifed in your declaration as 141.MusicCity.com, does this server give -- Strike that.
Does the server identified as 141.MusicCity.com give StreamCast any ability to control the searches that a Morpheus 2.0 user runs?
MR. BORKOWSKI: Object to the extent it calls for a legal conclusion.
THE WITNESS: No.
MR. LAPPLE:
Q. Does the server identified as 141.MusicCity.com

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give StreamCast any ability to control the files that a Morpheus 2.0 user chooses to make available for others to download?
MR. BORKOWSKI: Object to the extent it calls for a legal conclusion.
THE WITNESS: No.
MR. LAPPLE:
Q. Does the server identified as 141.MusicCity.com

give StreamCast any ability to control the files that a Morpheus 2.0 user chooses to download?
MR. BORKOWSKI: Object to the extent it calls for a legal conclusion.
THE WITNESS: No.
MR. LAPPLE:
Q. The next one you identify is under 52-e, "Third-Party Host Cache Servers."
I think we may have already discussed this. These are servers that aren't owned or operated by StreamCast?
A. Correct, to my knowledge.
MR. BORKOWSKI: May call for speculation.
THE WITNESS: But they are critical in terms of connecting a Morpheus client to the network, which would be critical in terms of their ability to do file-sharing or uploading.

* * * *

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what you think the average age is, gender and technical capability, that is not an expert opinion, just kind of your own personal anecdotal evidence?
A. I would say so. .
Q. Do the third-party host cache servers referred to in Paragraph 52-e give StreamCast any ability to control the files that a Morpheus 2.0 user searches for?
MR. BORKOWSKI: Object to the extent it calls for a legal conclusion.
THE WITNESS: No. It would not affect what they could type in or enter as a search.
MR. LAPPLE:
Q. Would any of the servers identified in 52-e affect the search results that returned after a search

wa.
MR. BORKOWSKI: Vague, ambiguous as to the meaning of the word "affect."
THE WITNESS: No, I don't believe so.
MR. LAPPLE:
Q. Do any of the third party host cache servers identified in Paragraph 52-e give StreamCast any ability to control the files that a Morpheus 2.0 user chooses to make available for downloading to others?
MR. BORKOWSKI: Object to the extent it calls for a

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legal conclusion.
THE WITNESS: No.
MR. LAPPLE:
Q. Do any of the third-party host cache servers identified in Paragraph 52-e give StreamCast any ability to control the files that a Morpheus 2.0 user chooses to download.
MR. BORKOWSKI: Object to the extent it calls for a legal conclusion.
THE WITNESS: No.
MR. LAPPLE:
Q. Let's look at 52-f. We may have already discussed this briefly, too. It says, "Third-Party DNS Servers."
Correct me if I'm wrong, I believe you testified earlier you didn't know whether Morpheus owned or operated a DNS server.
A. Correct.
Q. Are these third-party DNS servers ones that you know that StreamCast does not own or operate?
MR. BORKOWSKI: Objection. Asked and answered.
THE WITNESS: I don't know if StreamCast owns or

operates them.
MR. LAPPLE:
Q. Do you know if any of the third-party DNS

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servers referred to in Paragraph 52-f give StreamCast any ability to control the searches that a user runs on Morpheus 2.0?
MR. BORKOWSKI: Object to the extent it calls for a legal conclusion.
THE WITNESS: Once again, I would say that the DNS plays a critical role in connecting the Morpheus client to the network.
If they are not connected to the network, all file sharing would be impossible, either uploading or downloading. But beyond that, they have no influence over what the user enters for download or decides to upload.
MR. LAPPLE:
Q. So it's an all-or-nothing situation?
MR. BORKOWSKI: Objection. Vague, ambiguous, unintelligible.
THE WITNESS: Yes. Maybe you can rephrase it for me.
MR. LAPPLE:
Q. If I understand what you are saying, the only way that a third-party DNS server could control, affect, limit or influence a search that a Morpheus 2.0 user runs -- they could prevent a Morpheus 2.0 user from running any search at all; right?

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MR. BORKOWSKI: Objection. Misstates testimony.

THE WITNESS: If one needs a DNS server to resolve the names that are used in the software to attempt a connection, if there was no DNS server, one could not resolve the names and therefore not make the connection.

MR. LAPPLE:

Q. So the third-party DNS servers allow a Morpheus 2.0 user to connect to the Gnutella network?

A. Correct.

Q. But other than connecting to the network or not connecting to the network, they have no way to give StreamCast any control over a search that a Morpheus 2.0 user runs?

MR. BORKOWSKI: Object to the extent it calls for legal conclusion.

THE WITNESS: That's correct.

MR. LAPPLE:

Q. Does a third-party DNS server referred to in Paragraph 52-f of your declaration give StreamCast any ability to limit or control the files that a Morpheus 2.0 user chooses to make available for others to download?

MR. BORKOWSKI: Object to the extent it calls for legal conclusion.

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THE WITNESS: No.

MR. LAPPLE:

Q. Do the third-party DNS servers referred to in Paragraph 52-f of your declaration give StreamCast any ability to limit or control the files that a Morpheus 2.0 user chooses to make available -- I'm sorry -- a Morpheus 2.0 user chooses to download from others?

MR. BORKOWSKI: Object to the extent it calls for legal conclusion.

THE WITNESS: No.

MR. LAPPLE:

Q. 52-g refers to "Third-Party Ad Content Servers."

Do you know if any of the servers referred to in this paragraph are owned or operated by StreamCast?

A. I don't believe they are.

Q. Do any of the third-party ad content servers referred to in Paragraph 52-g give StreamCast any ability to limit or control the searches that a Morpheus 2.0 user runs?

MR. BORKOWSKI: Object to the extent it calls for legal conclusion.

THE WITNESS: No.

MR. LAPPLE:

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Q. Do any of the third-party ad content servers in 52-g give StreamCast any ability to control or limit the files that a Morpheus 2.0 user chooses to make available for others to download?

A. No.

MR. BORKOWSKI: Object to the extent it calls for legal conclusion.

THE WITNESS: No.

MR. LAPPLE:

Q. Do any of the third-party ad content servers referred to in Paragraph 52-g of your declaration give StreamCast any ability to control the files that a Morpheus 2.0 user chooses to download?

MR. BORKOWSKI: Object to the extent it calls for legal conclusion.

THE WITNESS: No.
MR. LAPPLE:
Q. And 52-h, "Third-Party Commerce Servers." Do you know whether StreamCast owns or operates any of the servers referred to in this paragraph?
A. I don't know.
Q. Do any of the third-party commerce servers referred to in Paragraph 52-h of your declaration give StreamCast any ability to control the searches that a Morpheus 2.0 user runs?

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MR. BORKOWSKI: Object to the extent it calls for legal conclusion.
THE WITNESS: No.
MR. LAPPLE:
Q. Do any of the third-party commerce servers in Paragraph 52-h give StreamCast an ability to limit or control the files that a Morpheus 2.0 user chooses to make available for others to download?
MR. BORKOWSKI: Object to the extent it calls for legal conclusion.
THE WITNESS: No.
MR. LAPPLE:
Q. Do any of the third-party commerce servers referred to in Paragraph 52-h give StreamCast any ability to limit or control any of the files that a Morpheus 2.0 user chooses to download?
MR. BORKOWSKI: Object to the extent it calls for legal conclusion.
THE WITNESS: No.
MR. LAPPLE: Off the record.
(A discussion is held off the record.)
(A recess is taken from 2:30 p.m. to 2:38 p.m.)

MR. LAPPLE: Back on the record.
Q. We're on the record.
Could you flip to Exhibit 4 of your declaration.

* * * *

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Morpheus uses, wouldn't those results show up even if this "SHOW_ONLY_METADATA_RESULTS" tag was turned on?
MR. BORKOWSKI: Objection. Incomplete hypothetical.
THE WITNESS: I believe they would.
MR. LAPPLE:
Q. So this tag doesn't necessarily limit a Morpheus 2.0 user's ability to search other Morpheus 2.0 clients.
It simply says, if it's turned on, only look at search results that match a certain format of metadata; right?
A. That's correct. That could significantly limit any user search, which is what you were asking.
Q. Could it give StreamCast the ability to prevent a user from searching for a particular file?
A. No.
Q. Could it give StreamCast the ability to prevent a user from making a particular file available for someone else to download?
A. No.
Q. Could it give StreamCast the ability to prevent that user from downloading a particular file?
A. Well, if the file did not contain metadata and the tag was turned on, then the file would not be listed

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as in the result window.

Therefore, nothing could be downloaded, so it could have an effect.

Q. Do you know if StreamCast has an exclusive ability to put metadata into these files?

MR. BORKOWSKI: Objection. Vague and ambiguous.

THE WITNESS: No, they do not have an exclusive ability.

MR. LAPPLE:

Q. Anyone who has a file can add metadata to it?

A. That's correct.

Q. They can put it in any format they choose?

A. There are degrees of freedom to write.

Q. What are those degrees of freedom to write?

A. Well, if you could, as the author of the Gnutella client, decide what metadata fields you wanted to include and which ones you didn't, that was the degree of freedom I was referring to.

Q. Does turning on or turning off SHOW_ONLY_METADATA_RESULTS give StreamCast an ability to affect a particular file, whether it can be searched for or shared or downloaded?

MR. BORKOWSKI: Asked and answered. Compound, vague, ambiguous.

THE WITNESS: It would not prevent the file from

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being searched for.

What were your other two options?

MR. LAPPLE:

Q. Shared.

A. Shared. It would prevent sharing in the -- in the sense that some other Morpheus client that had the tag turned on, if this particular file did not have metadata, it would not be visible.

But maybe you are asking whether they can target it to a specific file.

Q. That's exactly what I'm asking.

A. No. It's applied to all files and -- Sorry.

Q. Since we're talking about this auto.XML file, let's continue on.

Could you look at Paragraph 42 of your declaration.

A. (Indicating.) Okay.

Q. It refers to a tag that is called, quote, "HIDE_NO_SLOT_RESULTS," closed quote.

Is that also a tag that is sent through this auto.XML file we're talking about?

A. Correct.

Q. What does it do?

A. If "HIDE_NO_SLOT_RESULTS" is turned on, then when the Morpheus client gets a query to see if it has a

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file, if all of the slots that it currently has allocated are occupied because they are uploading, let's say, then it will only check for a file match with the files that are currently being uploaded, but it will not check it against all possible shared files.

Then in addition, if the user happens to be behind a firewall and the "HIDE_NO_SLOT_RESULTS" tag is set to "True," then that client would not check the query against any of its share files. It would simply drop it.

Q. Does the "HIDE_NO_SLOT_RESULTS" tag give StreamCast an ability to limit a Morpheus 2.0 user's ability to search for a particular file?

A. No.

Q. Does the "HIDE_NO_SLOT_RESULTS" tag give

Morpheus -- give StreamCast an ability to control a Morpheus 2.0 user's ability to offer a particular file for download to someone else?
A. No.
Q. Does the "HIDE_NO_SLOT_RESULTS" tag give StreamCast the ability to limit or control the ability of a Morpheus 2.0 user's -- Strike that.
Does the "HIDE_NO_SLOT_RESULTS" tag give StreamCast the ability to limit or control a Morpheus 2.0 user's ability to download a particular file?

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MR. BORKOWSKI: Object to the extent it calls for a legal conclusion.
THE WITNESS: Well, in not a specific file, but in general, it would. It would reduce -- It would reduce the possibilities for downloads, though -- Well, let me rethink that a minute.
I guess, because all the slots would be taken and the tag would be set to "On," even though the file was shown as being present, it could not actually be delivered at that moment. So it may or may not have an effect.
I guess I don't mean -- Sorry I can't be more precise on that.
MR. LAPPLE:
Q. Does the "HIDE_NO_SLOT_RESULTS" tag give StreamCast the ability to identify a particular file that cannot be downloaded by a Morpheus 2.0 user?
A. No.It's not referencing a particular file.
Q. Paragraph 43, you refer to a couple of tags. They are related to what we call flow control; correct?
A. Correct.

Q. Those tags are <fcont> and <wgtt>?
A. That would be flow control and waiting.
Q. Did I identify the tags correctly?

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A. You did.
Q. Do either of these tags give StreamCast the ability to control the search that a Morpheus 2.0 user runs?
MR. BORKOWSKI: Object to the extent it calls for legal conclusion.
THE WITNESS: These two tags control the way messages would be processed by the client.
And by altering the values, they can alter the order in which messages are processed. So it could well have an effect on how efficient a search would be, but it would not refer to any specific file.
MR. LAPPLE:
Q. So in other words, these two tags could influence whether the whole network worked well or whether the whole network worked poorly; right?
A. Yes, it could.
Q. They wouldn't allow StreamCast to identify a particular file that shouldn't be traded?
A. That's correct.
Q. Paragraph 44 you talk about firewall testing. You identify a tag called "ALLOW_FIREWALL_TESTING."
What does that do?
A. This tag, when set to "Yes," allows the Morpheus user an application to check to see whether or

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not it is behind a firewall or whether someone it is

talking to or communicating with is communicating behind a firewall.

So it would cause a check to be made. And this check would be important, because if two communicating Gnutella clients are both behind firewalls, they cannot do a file transfer.

That would -- So this tag would help resolve that issue.

Q. Does the "ALLOW_FIREWALL_TESTING" tag give StreamCast any ability to control the searches a Morpheus 2.0 user runs?

MR. BORKOWSKI: Object to the extent it calls for legal conclusion.

THE WITNESS: No.

MR. LAPPLE:

Q. Does the "ALLOW_FIREWALL_TESTING" tag give StreamCast any ability to control the files that a Morpheus 2.0 user makes available for others to download from them?

MR. BORKOWSKI: Object to the extent it calls for a legal conclusion.

THE WITNESS: No.

MR. LAPPLE:

Q. Does the "ALLOW_FIREWALL_TESTING" tag give

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StreamCast any ability to control the files that a Morpheus 2.0 user chooses to download?

MR. BORKOWSKI: Object to the extent it calls for a legal conclusion.

THE WITNESS: No.

MR. LAPPLE:

Q. Paragraph 45 identifies a couple more tags that -- Let's see. They are "Can_Delete" and

"Delete_Message."

A. Correct.

Q. Does the "Can-Delete" or the "Delete_Message" tage give StreamCast the ability to control searches that a Morpheus 2.0 user runs?

MR. BORKOWSKI: Object to the extent it calls for a legal conclusion.

THE WITNESS: No.

MR. LAPPLE:

Q. Do either of these tags give StreamCast the ability to control the files that a Morpheus 2.0 user makes available for other to download?

MR. BORKOWSKI: Object to the extent it calls for a legal conclusion.

THE WITNESS: No.

MR. LAPPLE:

Q. Do either of these tags give StreamCast the

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ability to control the files that a Morpheus 2.0 user chooses to download for themselves?

MR. BORKOWSKI: Object to the extent it calls for a legal conclusion.

THE WITNESS: Well, it might have an effect here. Because if a Morpheus user chooses to download a file and then changes their mind and tries to delete the file, if the "Can_Delete" tag is set to "No" they will not be able to do it.

MR. LAPPLE:

Q. Does it give StreamCast the ability to prevent a particular file from being downloaded by a Morpheus 2.0 user?

A. It would be applied to a particular file.

Q. So I could set one or both of these tags to say

that a Morpheus 2.0 user can't download any file that contains Madonna's "Like a Virgin"?
A. The tags appear in the auto.XML file, as a result of which they refer to files that would be downloaded through the auto.XML file, not through the normal file sharing mechanism you are referring to.
Q. Okay.
So when you said it prevents a user from deleting or canceling a download, you mean a download coming through the auto.XML file, not a download from another

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Morpheus 2.0 user?
A. No. That's incorrect.
MR. BORKOWSKI: Misstates testimony
THE WITNESS: That's incorrect.
For example, if you click on the "Media Manager" button, you are going to try to download the Media Manager, and you will try to download it from another Gnutella client.
But if the "Can_Delete" tag was set to "No," you will not be able to delete that download. It will run to completion.
MR. LAPPLE:
Q. Does the "Can_Delete" tag or the "Delete_Message" tag give StreamCast any ability to control the music files that a user chooses to download?
MR. BORKOWSKI: Object to the extent it calls for legal conclusion.
THE WITNESS: If by "music files" you mean selecting audio in the file search area, no, it would not affect those.
Q. Same question as to video files.

A. No.
MR. BORKOWSKI: Object. Calls for legal conclusion.

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THE WITNESS: No.
MR. LAPPLE:
Q. Paragraph 46, you refer to the "<pong>" tag. I think we discussed this. Correct me if I'm wrong.
A. Yes, we did.
Q. The <pong> tag is -- you explained it is a way for StreamCast to identify other ways to connect to the network, right, to connect to the Gnutella network?
A. Correct.
Q. Does the <pong> tag give StreamCast any ability to control the searches that a Morpheus 2.0 user runs?
MR. BORKOWSKI: Object to the extent it calls for legal conclusion.
THE WITNESS: No.
MR. LAPPLE:
Q. Does the <pong> tag give -- Does the <pong> tag give StreamCast the ability to control the files that a Morpheus 2.0 user chooses to make available to others?
MR. BORKOWSKI: Object to the extent it calls for legal conclusion.
THE WITNESS: No.
MR. LAPPLE:
Q. Does the <pong> tag give StreamCast the ability

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to control the files that a Morpheus 2.0 user chooses to

download?
MR. BORKOWSKI: Object to the extent it calls for legal conclusion.
THE WITNESS: No.
MR. LAPPLE:
Q. Paragraph 47 identifies a couple more tags. No. I'm sorry.
A. Just one.
Q. <art> or "ad_refresh_time." I bet you know what questions I'm going to ask.
A. Go ahead.
Q. Does the <art> tag give Streamcast the ability to control the files that a user searches for and makes available to others to download or downloads themselves?
MR. BORKOWSKI: Object. Calls for legal conclusion, is compound.
THE WITNESS: No.
MR. LAPPLE:
Q. Paragraph 48 identifies another tag, which is <xuf> or "xml_update_frequency."
Does the "xml_update_frequency" tag give Streamcast any ability to control the files that a user searches for, the files that a user makes available for others to

download or the files that a user chooses to download themselves?
Mr. BORKOWSKI: Calls for a legal conclusion.
THE WITNESS: This is a bit of a recursive answer, since the <xuf> tag controls the downloading of the auto.XML file.
Since I already pointed out that there are tags

within the auto.XML file that can control file sharing to a certain degree, then I would have to say yes, this tag will certainly affect it.
MR. LAPPLE:
Q. Are there any tags in the auto.XML file that you believe can control or limit the ability of a Morpheus 2.0 user to search for a file, download a file or make a file available for someone else to share that we haven't discussed?
MR. BORKOWSKI: Object to the extent it calls for legal conclusion. Compound.
THE WITNESS: Let's see.
We have discussed the "Can_Delete," "Delete" message, the "HIDE_NO_SLOT_RESULTS" "ALLOW_FIREWALL_TESTING,""SHOW_ONLY_METADATA_RESU
I think that that is the set of tags that, at, present, could be used to control file sharing, though, of course, at any point, MusicCity can add tags and add

the code to process those tags.
There is a general mechanism which exists, but I think we've covered everything for the moment.
MR. LAPPLE:
Q. Now, adding tags, that is something that would require modification to the auto.XML file; right?
A. Yes.
Q. That in turn would require a modification to the Morpheus 2.0 source code?
A. That's correct.
Q. How does a bug arise in software?
MR. BORKOWSKI: Objection. Vague, ambiguous, overbroad.
THE WITNESS: Mr. Borkowski is very correct. It's

a very broad question.
Sorry if I mumbled your name wrong.
MR. BORKOWSKI: You wouldn't be the first, certainly not the last.
THE WITNESS: Thank you very much.
A bug can arise in many different ways. It can be -- It can arise from an incomplete specification or an incorrect specification or a syntax error, like a misspelling or something that -- some unanticipated consequence that would occur between, let's say, the software you wrote and some software that you were

* * * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed Nov. 4, 2002]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

DECLARATION OF STEVEN D. GRIBBLE, PH.D., IN SUPPORT OF REPLY OF DEFENDANT MUSICCITY.COM, INC.'S (NOW KNOWN AS STREAMCAST NETWORKS, INC.) AND MUSICCITY NETWORKS, INC.

I, Steven D. Gribble, hereby declare as follows:

1. I am an assistant professor in the Department of Computer Science and Engineering at the University of Washington. My background and qualifications are detailed in my Declaration in support of Defendant StreamCast Networks' motions for summary judgment. Except where otherwise indicated, I make this declaration based on my own personal knowledge. If I am called as a witness before the Court, I could and would testify to the matters set forth herein. I make this declaration in support of Defendants' Reply In Support of Motions for Partial Summary Judgment.

2. I have reviewed the Declaration (hereinafter "Horowitz Decl.") and Deposition Transcript (hereinafter "Horowitz Depo. T.", attached as Exhibit "1" to the Declaration of Matthew C. Lapple) of Plaintiffs' Expert Witness, Professor Ellis Horowitz. Certain of the statements made by Professor Horowitz are incomplete or ambiguous; I

therefore provide this declaration to clarify these statements. My clarifications, based on my own knowledge and experience, include reference to Professor Horowitz's own deposition testimony (where appropriate).

THE NATURE OF SOFTWARE

3. In several places in his Declaration, Professor Horowitz speaks of computer software as if it were organic; as if software bugs[1] could arise over time, or as if software, like a rusting automobile, could "degrade" with age. Software itself is not organic: it does not grow or die over time. Similar to how the words and plot of a novel are determined by its author, the content and functionality of software is determined by the authors of the software's source code. A software author may experiment with particular lines or blocks of source code while developing the software, causing resulting changes in the functionality of the software. However, once the software author decides to release a version of the software to the intended users, like an edition of a novel, the version of the software is "set." The source code that makes up that version of the software is compiled to produce a program[2], and the resulting program is then distributed to an intended user, who typically then will decide whether or not to install the program onto her

[1] A "bug" is an error in software that can cause it to behave in an unexpected or undesirable fashion.

[2] Software users typically interact with "compiled" programs, not source code. Source code is the human readable "recipe" that dictates how the software behaves. Programmers create and edit source code while developing the software. To produce a program (i.e., the file or set of files that your computer actually runs), programmers use a tool called a compiler to generate a computer-readable program from the source code. A program is typically not easily human readable, and is typically immutable once generated. This program is what is distributed to end users, and installed and run on your computer.

computer.

4. Once installed on a hard drive, the program itself typically *does not change* unless the user chooses to delete or update the software. If the software manufacturer chooses to alter the original source code and release a new version of a program, those changes embodied in the new program obviously do not alter or affect the functioning of the program versions already installed on computers. If the software manufacturer decides to release an updated or altered version of program, users of pre-existing versions typically may choose whether or not to upgrade. However, if they choose not to upgrade, the programs existing on their machines will typically continue to work as well (or as poorly) as they worked prior to the release of the new version.

5. Software bugs are errors in source code which cause the compiled program itself to behave unexpectedly. Bugs are the result of errors in writing source code and therefore exist from the moment the software is release. Bugs, therefore, do not arise over time, although bugs may remain undiscovered for large periods of time. A ten year old "buggy"[3] computer program is no more or no less "buggy" than the day it was released. Similarly, "old" programs do not decay with age. In fact, old software can continue to function as long as the computers and operating systems on which the programs are designed to run continue to function.

6. Prime examples of "legacy" (old or outdated) software which continues to run are DOS-based programs. DOS was a popular computer operating system that was created approximately twenty years ago, but it has since been rendered obsolete by the advent of more advanced operating

[3] A computer program with numerous bugs is referred to in the vernacular of Computer Science as "buggy."

systems. Nevertheless, current versions of Microsoft Windows are able to run DOS programs written as many as approximately ten years ago.

7. It is this "immutable" nature of programs once released to the intended users which prevents StreamCast from altering the Morpheus programs on Morpheus users hard drives; a program that has been installed on a computer can only be altered through the installation of an update to or a new version of the program itself, which typically the direct action or consent of the user.

8. In his deposition testimony, Professor Horowitz admitted to the essential immutability of released programs and to the fact that bugs do not spontaneously "grow" in software.

> "Q. This might sound silly. A bug in software doesn't just grow; right? It doesn't spontaneously come into existence; right?
>
> A. No. It presumably is the result of some human being's action."

(Horowitz Depo. T. 166:5-10) (objections omitted)

"Q. If I write a program that has some bug in it, and I go through it, I run it and I study it, and I say, 'Okay. I'm happy with the performance of this program. I'm going to release it to the public,' but I don't fix the bug that is currently in it, that bug is there; right?

A. Yes.

Q. But I haven't discovered it yet; right?

A. Yes.

Q. Sometime in the future, somebody else might discover it?

A. Yes.

Q. In fact, someone probably will discover it?

A. If the software is used.

Q. But that doesn't necessarily prevent the piece of software I wrote that is being used by someone else from functioning exactly as the way it functioned when I worked with it and thought it was okay to be released; right?

A. It could perform useful functions. The bug needn't be so serious that it makes the software inoperable.

Q. Presumably, I could choose to offer an upgrade that would fix that bug, or I could choose not to offer an upgrade that would fix that bug; right?

A. Yes, you could."

(Horowitz Depo. T. 167:1-168:5) (objections omitted)

"Q. Does the discovery of a bug in a piece of software change the way that software works?

A. No.

Q. It just works with the bug?

A. Whether the bug is discovered or not -- Well, let me put it this way:

If you -- You may invoke a feature which has the bug and cause the software to crash.

On the other hand, you may use the software for many hours, never encounter the bug and not experience anything that surprises you."

(Horowitz Depo. T. 169:12-25) (objections omitted)

"Q. When you say here in Paragraph 50 of your declaration, quote, 'As new versions of user operating systems were released, it is not clear that Morpheus could continue to function without alteration,' isn't it true that I could use the same sentence and change 'Morpheus' to the name of any other program and it would still be true?

A. That is correct."

(Horowitz Depo. T. 172:6-13) (objections omitted)

"Q. In Paragraph 19 you say, 'The second concept relates to the ease and regularity in which software is revised and upgraded. Software is rarely considered fixed in perpetuity. To the contrary the industry norm is that software is routinely upgraded. Software programs distributed to end users are often subject to frequent upgrades.'

Is it industry practice for those upgrades to be optional?

A. It is generally the case that they are optional. That is correct.

Q. Can you think of any case in which they are not optional?

A. No. I don't think I can.

Q. In the next two sentences, 'Sometimes upgrades are to fix minor problems or 'bugs'; many times upgrades are to add additional features or to enhance existing ones. Regardless of the reason, it is an extremely common

practice, and one that allows applications to evolve over time.'

If software upgrades are optional, then the application only evolves over time if the user chooses it to; right?

A. Yes.

Q. So a user can choose not to accept an optional upgrade?

A. Yes.

Q. Then their software won't evolve?

A. That's correct."

(Horowitz Depo. T. 99:15-100:22) (objections omitted)

STREAMCAST LACKS THE ABILITY TO "FORCE" A USER TO UPGRADE MORPHEUS

9. Professor Horowitz performed an experiment purporting to "show" that StreamCast could, "if it wanted to", "force" its users to upgrade its software. As I explained in my deposition testimony, I have confirmed (by supervising an experiment) that the version of the Morpheus program Professor Horowitz tested would allow StreamCast to make a number of changes in the auto.xml file and cause Morpheus to download and execute a program without prompting the user for permission to do so. However, I am informed that this is not the intended ability of the software, and its existence is due to a "bug" in the software's source code. Moreover, the existence of this bug might even constitute a security risk! In addition, even if StreamCast were to make the changes to its auto.xml file, thereby causing an automatic download, the user could still prevent the installation of the program by simply refusing to allow Microsoft Windows to

install the program.[4]

10. Professor Horowitz admitted during his deposition that, although he was able to cause a "forced download" by changing a number of parameters in the auto.xml file, this would only *begin* the install process; he confirmed that he could not cause the software to *complete* the install process without the user's consent. Professor Horowitz testified:

> "A. And on launch, it called for the auto.XML file, which I got from my machine, the UNIX machine, and you could see in the traffic window that it started to download the Media Manager, so it went into Auto_Download mode.
>
> Q. Did it complete the download?
>
> A. Yes.
>
> Q. Then what happened?
>
> A. It proceeded to start installation of the program.
>
> Q. And when it did that, what happened?
>
> A. A window appears, or sort of a screen appears and it announces it's being installed.
>
> Then you need to step through a couple of steps to get it installed.
>
> Q. Is that pane entitled Wise Install

[4] Most software that runs on Microsoft Windows is installed using a tool called an "installer"; the basic job of an installer is to take the set of files that constitute the program, and places them in the right place on the user's hard drive. Most installers, including the "WISE" installer that StreamCast uses in distributions of Morpheus, are configured in such a way as to prompt the user for permission to install the program, giving the user the ultimate decision over what should and should not be installed on her computer.

Wizard?

A. Yes, the Wise Installer.

Q. What are the steps that you just said you have to step through?

A. It's basically questions about where it's going to put the program, sort of the usual sorts of questions you get before you -- as you go to install a program.

Q. Like where on the hard disk which directory it's going to be saved under, installed under?

A. Right.

Q. Any default settings to apply to the program --

A. Yeah.

Q. -- in order to -- These are decisions the user has to make?

A. Typically during the installation process.

Q. Are there any buttons that the user has to click or information the user has to type in during the installation process?

A. Buttons to click to move to the next screen.

Q. Do you remember how many buttons?

A. No.

Q. Can you give me an estimate?

A. I don't really recall.

Q. Was it more than one?

A. I believe it was.

Q. Was it more than three?

A. I don't really recall.

Q. Does the Wise Install Wizard give the user the option to not install the program?

A. I don't really recall. It well might have a "Cancel" button.

Q. You don't know?

A. I don't recall.

Q. Presumably, if it does have a "Cancel" button and the user presses the "Cancel" button, the installation will stop; right?

A. Generally that is the behavior one would expect."

(Horowitz Depo 210:24-213:3) (objections omitted)

"Q. Do you have any knowledge or evidence that StreamCast has in fact done that, where they got a program downloaded and automatically installed without any user click box?

A. I don't have any knowledge of it.

At the same time, I don't think the users of Morpheus are aware of the fact that the decision of whether or not to do that rests in the hands of the Morpheus developers.

Q. Why wouldn't you want someone to be able to do an automatic download and installation?

A. Because generally we feel, before anything goes on our computer, we want to be asked about or else give permission for things to be placed there.

Q. When you say 'we,' who do you mean by that?

A. Just all of us who have our own

computers. I think we're all concerned that the computers remain free of unwanted software viruses, in particular, but even other things, advertisements, spamming.

And I think, as a general matter, you would want to be asked whether or not something could be placed on your machine before someone placed it there.

Q. Because if you don't it's almost like a virus?

A. Or it could well be.

A virus, I'm not saying I don't have any evidence that there is any intent in that direction. But if one has the ability to download an arbitrary program to any one of the 10 million or more Morpheus users, think about how -- the potential impact of that. Even if only 10 percent of those Morpheus users were connected at any given time, it could have rather disastrous consequences."

(Horowitz Depo. T, 215:25-217:8) (objections omitted)

"Q. Do you think it would be unethical to require or to send a forced download that would automatically download and automatically install on a user's machine a piece of software?

A. I think it would be unethical to download to someone's machine software which would be radically different or totally unrelated to what you thought you had when you were running that particular application.

So it might be appropriate to do an upgrade of an existing product where someone certainly has said, 'Yes, please send me

upgrades.'

But if someone is running a word processor, I don't think you'd want to send them a virus program.

Q. Do you know of any software companies that do forced upgrades where the upgrade is automatically downloaded and automatically installed without the consent or agreement of the user?

A. I couldn't think of one."

(Horowitz Depo. T. 217:18-218:13)

STREAMCAST'S SERVERS DO NOT ALLOW STREAMCAST TO CONTROL THE FILE SHARING BEHAVIOR OF MORPHEUS USERS

11. Professor Horowitz also makes a number of representations about the servers maintained by StreamCast. However, it is notable that Professor Horowitz never represents that StreamCast's servers, like those of Napster or Aimster, gives StreamCast the ability to control the users ability to share, search, or download specific files. As such, my testimony regarding this crucial fact stands uncontradicted.

12. With respect to the auto.XML tags, Professor Horowitz has stated that he understands that *none* of these tags give StreamCast the ability to control the files that a user searches for, the files that a user makes available for others to download, or the files that a user chooses to download or share. Regarding Professor Horowitz's specific statements confirming this, see: "SHOW ONLY METADATA RESULTS" (Horowitz Depo. T. 152:15-154:12); "HIDE NO SLOT RESULTS" (p. 155:11-156:18); Flow Control and Waiting Tags (Horowitz Depo. T. 159:19-157:20); "ALLOW_FIREWALL_TESTING (Horowitz Depo. T.

158:10-159:5); "CAN_DELETE" and "DELETE_MESSAGE" Tags (Horowitz Depo. T. 159:7-162:1); The <pong> Tag (Horowitz Depo. T. 162:10-163:5); The <art> Tag (Horowitz Depo. T. 163:13-19); The <suf> Tag (Horowitz Depo. T. 163:21-165:10).

13. Professor Horowitz also confirmed that *none* of the "central servers" that he identifies in his declaration give StreamCast the ability to control the particular files that a user searches for, makes available to others to download, or downloads himself. Professor Horowitz's statements that confirm this (for each specific server) are contained at the respective locations: "Start.MusicCity.com" (Horowitz Depo. T. 129:7-13-2:15); "Ads.MusicCity.com (p. 135:19-136:14); "Webservice.MusicCity.com" (Horowitz Depo. T. 136:16-137:13); "141.MusicCity.com" (p. 137:18-138:13); Third-Party Host Cache Servers (Horowitz Depo. T. 142:5-143:10); Third-Party DNS Servers (Horowitz Depo. T. 143:25-146:11); Third-Party Add Content Servers (Horowitz Depo. T. 146:18-147:16); Third-Party Commerce Servers (Horowitz Depo. T. 147:22-148:19).

14. Professor Horowitz further confirmed in his deposition that the Gnutella protocol is independent of StreamCast, that it existed before StreamCast, and that the Gnutella network will continue to exist if StreamCast were to shut down all of its servers. Horowitz Depo. T. (226:20-227:20) (objections omitted).

PLAINTIFFS' REFERENCE TO KAZAA'S VIRUS FILTER FAILS TO ADDRESS THE NUMEROUS DIFFICULTIES IN IMPLEMENTING A FILTER

15. Professor Horowitz also refers to a virus filter utilized by the Kazaa protocol as evidence which suggests that StreamCast could implement a filter to prohibit the distribution of copyrighted material on the Gnutella Network using Morpheus. The specific virus filter endorsed by Kazaa

is the "Bullguard" virus detection software. However, the architecture, complexity, and operation of a music fingerprinting filter designed to enforce copyright protection would likely differ in many substantial ways from a virus filter such as Bullguard's. As a simple example, a music filter than employs acoustic fingerprinting is probabilistic in nature, and has failure modes such as false positives or false negatives. Virus filters tend to look for much more deterministically identifiable signatures in infected files, and accordingly tend to have extremely low false positive or false negative rates.[5]

16. In my Declaration in Support of Defendant StreamCast Networks' Opposition to Plaintiffs' Motion for Summary Judgment, I previously discussed in some detail my opinions on the difficulties that the implementation and deployment of a copyright filter would face; I continue to believe that Plaintiffs' experts and witnesses have not adequately established that the kinds of filters that they propose can overcome these issues.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration is executed in Seattle, Washington on November 4, 2002.

/s/
Steven D. Gribble, Ph.D

[5] Some particularly sophisticated viruses "mutate" themselves upon infection; to detect these, virus filters need to rely on heuristics rather than deterministic signatures.

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* * * *

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* * * *

Q. Could you look at Paragraph 33 of your declaration.

There is a sentence there, look like the third sentence, says, "The user is not presented with any dialog box giving the user the opportunity to accept or decline the download or installation of the application."

Then it says, "The Media Manager application simply downloads (automatically) -- and begins execution of the installation (automatically) -- without any further action by or consent of the user."

Couldn't you also add a sentence at the end of that to say, "But the installation process cannot be completed without additional action by the user"?

MR. BORKOWSKI: Objection. Lacks foundation.

THE WITNESS: You know, I think I was making the point that the Morpheus program is relying on this other program to give the user the right to cancel its installation; and therefore, some programs which chose not to alert the user to the fact it was being installed could simply be installed without knowledge of

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the user.

I think it would have been appropriate -- or let me put it this way:

I think it's -- I think I'm just making that point that it will start up the installation script without

any specific action from the user.
MR. LAPPLE:
Q. It won't complete the start-up -- It won't complete the installation script without a specific action by the user?
A. In the case of Media Manager?
Q. Will it complete the installation of -- Back up.
This is based on your experiment. This isn't how the software currently operates if someone goes to CNET.com and tries to download something; right?
A. Yes. The way it operates now, you have to click on the "Media Manager" button, which would indicate that you are interested in it.
Q. Is there any other software application or part of Morpheus 2.0 you are aware of that automatically downloads something, whether as it exists now or -- Sorry. Back up. That's a terrible question.
In your experiment where you were finding out whether you could automatically download something or

automatically install something, did you find anything that you were able to automatically download and automatically install to complete the installation process without the user having to click on some button?
MR. BORKOWSKI: Let me have that read back to make sure I have it.
(The record is read by the reporter.)
THE WITNESS: Well, I think it begs the question in the following sense:
Someone could write a program that, when the installation script is started, it simply installs and

asks the user nothing, though that is not common, but, for example, would be the case with viruses. Computer viruses don't ask us -- well, you know, at least they disguise their true identity.
So in the examples I chose to answer your direct question, the examples I chose, there was a box that did come up. I had to click to move through the installation process.
But it would be very easy for someone who wanted to make use of this mechanism not to put up any box and get their program installed.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed June 18, 2003]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

ORDER DIRECTING ENTRY OF PARTIAL FINAL JUDGMENT AND ALTERNATIVELY CERTIFYING APRIL 25, 2003 ORDER FOR IMMEDIATE APPEAL

I. INTRODUCTION

Now before the Court is Plaintiffs' Motion for entry of partial final judgment and for certification of the Court's April 25, 2003 Order ("April 25 Order") for immediate appeal. For the reasons set forth below, the Motion is GRANTED.

II. ANALYSIS

A. *Partial Final Judgment*

Plaintiffs move first for entry of partial final judgment under Fed. R. Civ. P. 54(b). Rule 54(b) provides that "[w]hen more than one claim for relief is presented in an action . . . , the court may direct the entry of a final judgment as to one or more but fewer than all the claims . . . upon an express direction that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b). Entry of partial final judgment is proper if it

will aid in "expeditious decision" of the case. *Texaco, Inc. v. Ponsoldt*, 939 F. 2d 794, 797-98 (9th Cir. 1991).

Defendant Sharman Networks ("Sharman") objects to this motion, contending that the April 25 Order did not finally resolve any of Plaintiffs' "claims," and thus that entry of judgment under Rule 54(b) is not proper.

The plaintiffs in each of the consolidated cases allege "single" copyright claims arising from Defendants' past and present conduct. The April 25 Order decided only those aspects of Plaintiffs' copyright claims as they apply to the "current versions" of Defendants Grokster, Ltd.'s ("Grokster") and StreamCast Network, Inc.'s ("StreamCast") software and services. The Court declined to rule on the current record as to the potential liability arising from "past versions" of Defendants' products and services. Sharman's position, therefore, is that the copyright claims have not been fully adjudicated, and are not eligible for entry of judgment under Rule 54(b).

Plaintiffs' response on this point is that a single "count" in a complaint may state more than one "claim," and that Rule 54(b) judgment may properly be entered where a single "claim" is resolved, even if Court does not dispose of the entire count. Plaintiffs note some authority to this effect. *See Primavera Familienstifung v. Askin*, 130 F. Supp. 2d 450, 539-40, 542-43 (S.D.N.Y. 2001) (citing Second Circuit for proposition that counts consist of multiple claims if the allegations therein could be parsed into separately enforceable causes of action); *Federal Election Comm'n v. Christian Coalition*, 52 F. Supp. 2d 45, 98 (D.D.C. 1999).

Indeed, the liberal pleading standards of the federal system inevitably give rise to circumstances in which a single count in a complaint may contain more than one legally cognizable claim. See Fed. Rules Civ. P. 8(a), 8(f); Arizona

Carpenters Pension Trust Fund v. Miller, 938 F.2d 1038, 1040 (9th Cir. 1991) (explaining that "claim" refers to set of facts giving rise to legal rights in a claimant). Because Plaintiffs' copyright claims as they apply to present versus past conduct are factually (and, potentially, legally) distinct, and because the Court's April 25 Order granted summary judgment for Defendants as to the former, partial final judgment may properly be directed.

Under Rule 54(b), it remains only for the Court to direct that there is no reason to delay entry of judgment, and that partial final judgment will aid in expeditious decision of the case. Fed. R. Civ. P. 54(b). Because appellate review of the Court's April 25 Order will undoubtedly inform the many remaining components of this case, and absent any persuasive reason for delay, the Court so directs.

Accordingly, the Court DIRECTS entry of partial final judgment on the claims concerning the "current versions" of Defendants' products and services as to which the April 25 Order granted summary judgment for Defendants Grokster and StreamCast.

B. *Certification for Appeal*

In addition, and in the alternative, Plaintiffs move the Court to certify the April 25 Order for interlocutory appeal pursuant to 28 U.S.C. § 1292 (b). Section 1292 (b) allows certification of an interlocutory order where "such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and . . . and immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292 (b).

1. *Controlling Question of Law*

There is little question that the April 25 Order involved a controlling question of law, as it determined Grokster's and

StreamCast's liability for their current products and services, and engaged in legal interpretation that undoubtedly would inform - if not decide - the issues of past liability for these Defendants.

2. *Substantial Grounds for Difference of Opinion*

Plaintiffs note a number of bases for a possible difference of opinion as to the correctness of the Court's April 25 ruling.

First, Plaintiffs assert that the Court applied the Ninth Circuit decision in A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) ("Napster") "more narrowly" than other courts by interpreting the conduct described therein as "necessary" to give rise to copyright liability, rather than simply "sufficient" to do so. Thus, they maintain, the fact that Grokster's and StreamCast's conduct does not rise to the level of Napster's should not preclude a finding of liability.

As the Court then noted, the fundamental question with respect to contributory liability is whether either Defendant materially contributes to the alleged infringement with knowledge of that infringement. (April 25 Order, at 16.) That this accurately reflects the elements of contributory infringement is confirmed by, and not in tension with, the decision purportedly at odds with this Court's Order. See Fonovisa, Inc. v. Napster, Inc., 2002 WL 398676, at *4 (N.D. Cal. Jan. 28, 2002).

Further, while the Court necessarily compared the conduct before it with that found potentially sufficient to give rise to secondary liability in Napster, Plaintiffs are incorrect to characterize the April 25 Order as interpreting Napster's conduct to be necessary to a finding of liability. After contrasting Defendants' conduct with that of Napster, the Court proceeded separately to consider at length the evidence adduced by Plaintiffs in support of their allegation that

Grokster and StreamCast materially contribute to their users' alleged infringement. (April 25 Order, at 24-27.) The Court concluded that Plaintiffs had adduced no evidence that Defendants materially facilitate or contribute to the file exchanges that form the basis of these lawsuits. (See id.) The Court of course agrees with Plaintiffs' legal proposition that a "range of conduct" may give rise to contributory copyright liability, other than "a combination of actual knowledge and failure to block access." Fonovisa, Inc. v. Napster, Inc., 2002 WL 398676, at *7. As was thoroughly elucidated in the April 25 Order, however, Plaintiffs failed to carry their burden of showing a material dispute as to whether Defendants' conduct falls within that range.[1]

Second, Plaintiffs point to the district court decision in In re Aimster Copyright Litigation, 252 F. Supp. 2d 634, 2002 U.S. Dist. LEXIS 17054 (N.D. Ill. Sept. 22, 2002). That case is factually and legally distinct. Most significantly, Aimster used copyrighted song titles as pedagogical examples in its user tutorial, provided catalogs of popular copyrighted music to its users, and generally based its service on encouraging the exchange of copyrighted music. Id., at *36, 40-42. The court in Aimster did not rely on the provision of filesharing software and support services alone, but rather pointed specifically to the fact that "Aimster predicates its entire service upon furnishing a 'road map' for users to find, copyright and distribute copyrighted music." Id. at *41-42. Such encouragement of copyright infringement undoubtedly is of a different tenor in the contributory infringement analysis than what was before this Court.

Moreover, the Aimster court specifically stated that the Napster decision, "while certainly persuasive on some points, is simply not precedential authority in this circuit . . . . [O]ur

[1] To the extent that the April 25 Order was not explicit on this point, the Order is amended to incorporate the analysis herein.

decision today need not rest on the legal reasoning or factual findings of the Napster courts." Id. at *4. Because the Aimster decision is unmoored from this circuit's binding precedent, it is unclear whether a contrary conclusion by that court, even if one was reached, constitutes the type of tension contemplated by 28 U.S.C. § 1292 (b).

Indeed, Plaintiffs point to the Aimster court's analysis of Sony Corp. of Am v. Universal City Studios, Inc., 464 U.S. 417, 104 S. Ct. 774 (1984), on the issue of whether Defendants' products have substantial non-infringing uses. Yet the Aimster court did not mention the Ninth Circuit's exposition of that issue in Napster (see 239 F.3d at 1020-21), by which this Court is bound. (See April 25 Order, at 12-13.) Further, Plaintiffs have essentially not disputed that Defendants' software has current and potential future substantial non-infringing uses, and it is curious that Plaintiffs would seek to squarely address this issue for the first time on appeal.

Finally, Plaintiffs take issue with the Court's observation that Grokster and StreamCast "may have intentionally structured their businesses to avoid secondary liability for copyright infringement, while benefiting financially from the illicit draw of their wares." (April 25 Order, at 33.) Plaintiffs contend that such efforts should not be countenanced by a finding that no copyright liability accrues. If this Court is correct in its interpretation and application of existing copyright law, however, this position is nothing more than an invitation to judicial policymaking - a course the Supreme Court has specifically warned against in the copyright context. See Sony, 464 U.S. at 431; Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394, 414, 94 S. Ct. 1129 (1974).

Nonetheless, as Plaintiffs observe, it is not necessary for the Court to believe it erred for there to exist a "substantial

ground for difference of opinion." So long as the Court's decision is "arguably" in tension with rulings by other courts, Section 1292 (b) certification is appropriate. See, e.g., Am Geophysical Union v. Texaco, Inc., 802 F. Supp. 1, 29 (S.D.N.Y. 1992). Given the relative novelty of the claims presented, the potentially contrary decision by the Aimster court, and the lack of controlling authority dispositive of the issues in this case, the Court's ruling clearly is susceptible to substantial differences of opinion.

3. Immediate Appeal Would Advance Termination of the Case

Because an appellate decision on the April 25 ruling is bound to inform and perhaps direct the Court's resolution of the issues remaining in this case, an immediate appeal is likely to facilitate termination of this litigation.

Although the Court's entry of partial final judgment affords Plaintiffs an appeal as of right, the Court alternatively amends the April 25 Order (as otherwise amended herein) to certify it for immediate appeal pursuant to 28 U.S.C. § 1292 (b).

C. Grokster's Request for Entry of Final Judgment

Grokster notes that, unlike StreamCast, it moved for summary judgment without qualification - StreamCast limited its Motion to the current versions of its software - and that the April 25 Order purported to grant Grokster's Motion. Accordingly, Grokster contends that all claims against it have been resolved, and final judgment should be entered in its favor.

As noted supra, however, the April 25 Order was expressly limited to the "current versions" of Grokster's and StreamCast's software and services. (See April 25 Order, at 6.) The Order specifically did not "reach the question

whether either Defendant is liable for damages arising from *past* versions of their software, or from other past activities." (Id.) To the extent that the April 25 Order was unclear, it is amended to reflect that Grokster's Motion was GRANTED IN PART as to Plaintiff's claims arising from the current versions of Grokster's products and services.

Grokster further contends that the "past versions" of its software and services are functionally synonymous with the "current versions," and thus that the Court's April 25 Order necessarily resolved all the claims against Grokster. The Court notes that at oral argument on the instant Motion, Plaintiffs suggested a dispute as to whether or not Grokster has previously operated factually distinct file-sharing services. Further, Grokster itself concedes that it at one time operated a "root supernode," and the Court has not ruled on the legal significance of that fact. (See April 25 Order, at 21 & n.6.) Finally, even if Grokster is correct as a factual matter that its current and past activities are essentially indistinguishable, the April 25 Order simply did not reach he latter category.

Accordingly, the Court declines to enter final judgment as to Defendant Grokster other than as directed supra pursuant to Rule 54 (b).

D. StreamCast's *Request to Stay Discovery*

Streamcast requests that the Court stay discovery on the claims remaining against it pending appeal. The Court declines that request.

III. CONCLUSION

Therefore, the Court HEREBY GRANTS Plaintiffs' Motion for Entry of a Partial Final Judgment Under Fed. R. Civ. P. 54 (b) and for Certification of the April 25 Order for Immediate Appeal Under 28 U.S.C. § 1292 (b).

The Court HEREBY DIRECTS entry of final judgment as to Plaintiffs' claim concerning the current versions of Defendants Grokster's and StreamCast's respective products and services.

The Court HEREBY AMENDS the April 25 Order (as otherwise amended herein) to certify it for interlocutory appeal pursuant to 28 U.S.C. § 1292 (b).

IT IS SO ORDERED AND ADJUDGED.

Dated: 06/18/03

/s/
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	AIMSTER COPYRIGHT MASTER FILE LITIGATION No. 01 C 8933	: : :
	Judge Marvin E. Aspen	:

PLAINTIFF'S PROPOSED PRELIMINARY INJUNCTION ORDER AND MEMORANDUM IN SUPPORT

* * * *

Exhibit B Napster injunction § 2. Complying with the Napster Injunction was extremely burdensome for Plaintiffs, requiring thousands of hours of investigative work, hundreds of hours of employee time, and the hiring of outside experts. *See* Exhibit C, ("Plaintiffs' Compliance Report"). For its part, Napster had three (3) business days to prevent such works from appearing on its system once it received notice. Exhibit B, Napster Injunction §§ 5 & 6. Finally, the injunction made it clear that Napster bore "the burden of policing the system within the limits of the system." Exhibit B, Napster Injunction § 4 (citing *Napster I*).

Although the Napster Injunction was in effect between March 5, 2001 and July 11, 2001, it simply failed to work. During that four-month period, the district court was forced to appoint a technical advisor, the parties filed numerous reports on Napster's "compliance" and "non-

compliance" with the injunction, the district court received several written and oral reports from the technical advisor, and held several hearings. Eventually, the district court ordered Napster to disable completely its file-sharing system until such time that it could show the district court it was doing everything feasible to block infringement and "achieve full compliance with the modified preliminary injunction." This "shut-down" order was affirmed by the Ninth Circuit. *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1095 (9th Cir. 2002) ("*Napster II*").

The most significant reason for the failure of the Napster injunction was Napster's refusal to implement an effective filtering technology. As outlined in a report filed by plaintiffs with the district court, various filtering technologies were available to Napster. See Exhibit C, Plaintiffs' Compliance Report. For example, Napster could have chosen to "filter in" only works that were licensed for distribution; or, it could have deployed digital fingerprinting technology that recognized whether a particular music file (based on certain characteristics, like sound waves or other metadata) was authorized for distribution. Instead, Napster initially chose to employ "text-based filtering," which did not block, for example, files containing misspellings in artist names or song titles. This method, as implemented by Napster, proved porous and wholly ineffective. *See Napster, II*, 284 F.3d at 1098 ("The text-based filter proved to be vulnerable to user-defined variations in file names.") [4]

Months later, and after significant urging by the plaintiffs, Napster was required to implement its

[4] Ironically, Aimster directly aided circumvention of Napster's text-based filtering by its "Pig Encoder." See Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 11. Clearly, Aimster easily could frustrate text based filtering on its own system.

technological filter based on audio fingerprinting, but did not demonstrate "every effort ha[d] been made to, in fact, get to zero tolerance." *Id.* at 1097. Even Napster then conceded that its filtering had been incomplete, and, when Napster voluntarily closed down its system, the district court ordered that the system remain down until Napster could get [the infringements] down to zero." *Id.* The Ninth Circuit affirmed that "shut-down" order.

Plaintiffs' experience with the Napster Injunction has influenced the formulation of their Proposed Order in several important ways: *First*, it is now clear that the most effective means of preventing infringements online, including over peer-to-peer systems, is for the site operator to "filter in" only those works that are authorized by copyright owners. [5] At least one company, CenterSpan Communications Corp. (located on the Internet at www.scour.com), operates such a licensed peer-to-peer system for the distribution of sound recordings and videos. *See* Exhibit D (www.scour.com). *Second*, "text-based filtering," similar to that used by Napster, cannot effectively filter copyrighted works in an online environment. Requiring Plaintiffs to provide artist names and song titles for filtering, therefore, does not serve to curtail the continued infringement. *And third*, the adoption of technological filtering solutions - whether to

* * * *

[5] A "filter in" method is the on-line version of the traditional process of obtaining permission from a copyright owner prior to copying or distributing copyrighted works.

Deposition of
Leonard Kleinrock
September 27, 2002

* * * *

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1 user into the network under his or her unique name."
2 My question is, do you know what happened under
3 that system if that log-in failed?
4 A.I'm reading the paragraph, if I may.
5 Q.Sure.
6 A.I believe that the user would be able to gain
7 access at that point. I'm not certain because I have to
8 look at some of the references, but I believe it would
9 allow him in.
10 Q.So when the log-in failed, the user was still
11 able to exchange files?
12 A.I think so.
13 Q.As the Grokster software is currently
14 configured and distributed, are you aware of any method
15 by which Grokster can cause copies of its software to
16 differentiate between infringing and noninfringing
17 content?
18 MR. KENDALL: Object to the form of the question.
19 Lacks foundation.
20 MR. FABRIZIO: I'd like to hear it back.
21 (The record is read by the reporter.)
22 THE WITNESS: Again, since I don't know - - I don't
23 have the source code. I don't know what capabilities
24 Grokster has to any of this infringing filtering.
25 MR. PAGE:

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1 Q.It would be necessary for you to have the
2 source code to be able to answer that question?
3 A.It might help.
4 Q.I understand that having it might still not

5 enable you to answer the question. Can you answer the
6 question without having access to the source code?
7 A.No, I cannot.
8 MR. PAGE: Let's take a break.
9 (A recess is taken.)
10 MR. PAGE:
11 Q: Let's turn to page 20 of your declaration.
12 MR. FABRIZIO: Could I have the last question and
13 answer read back.
14 (The record is read by the reporter.)
15 MR. FABRIZIO: I have a belated objection to that
16 as to form.
17 THE WITNESS: Where are we now?
18 MR. PAGE:
19 Q. Page 20.
20 MR. FABRIZIO: Is that where you'd like the witness
21 to be?
22 MR. PAGE: Yes.
23 Q.Page 20, you're discussing actually the section
24 that is captioned "Defendants'," plural, "ongoing
25 participation with ability to exercise control over

* * * *

Deposition of
Patrick Breslin
September 20, 2002

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to come back and give additional testimony in the case. That is a possible outcome. but the choice is entirely up to you.

BY MR. LAPPLE:

Q Has Relatable ever shown a profit?

MR. BORKOWSKI: Objection, irrelevant.

THE WITNESS: I don't see the relevance, but the answer is no.

BY MR. LAPPLE:

Q Has Relatable ever licensed or sold any of its technology?

A Yes, Relatable has licensed its software.

Q Which software?

A TRM.

Q You said earlier that you had a suite of products?

A Yes.

Q Could you be more specific as to which ones you licensed, or was it just all of them?

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A Yes. We have licensed TRM-B, we have licensed TRM-C, and we have licensed TRM-D.

Q To whom have you licensed each of

these pieces of software?

A We have licensed to Napster.

Q Which one?

A TRM-B.

Q Anyone else?

A There are confidentiality agreements to which I'm bound in terms of some of our licensees. It is public that Napster licensed our technology.

Q So you are refusing to identify any other licensees based on these confidentiality agreements?

A Yes.

Q Have you licensed your technology to the RIAA?

A No.

Q Have you licensed this technology to any of the RIAA member companies?

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A No, I have not.

Q Have you licensed this technology to any peer-to-peer file sharing companies?

A Yes, Napster.

Q Any other than Napster?

A No.

Q How many other licensees do you have, other than Napster?

A Two currently.

Q Have you had any others in the past?

A Yes.

Q Other than Napster?

A Yes.

Q Why are those licenses no longer in force?
A They were temporary licenses.
Q To whom?
A That was confidential as well, but generally speaking, we did license the technology to companies that monitor radio broadcasts. There was the -- the issue was

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A No.
Q Have you written any articles about file sharing or peer-to-peer technology?
A No.
Q Did you take any classes on computer programming?
A No, I did not.
Q Did you do any computer programming?
A Correction. In high school I did.
Q In high school?
A Yes.
Q Do you do --
A Excuse me, I would like to correct that statement as well.
I also did take courses in web development. That's a form of computer programming, yes. So I'm proficient in HTML and very familiar with JavaScript and somewhat familiar with ProScript.
Q Anything else?

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can be implemented as a regular process. Increase the number of files I the folder, TRM client understands that and generates the new fingerprints.
BY MR. LAPPLE:
Q So once the fingerprint is sent to the central server from the client, it is compared to a reference fingerprint database?
A Yes.
Q Is that reference fingerprint database currently built?
A Every new implementation of TRM can start with the new reference database.
Q Do you have any currently built?
A We have reference databases for testing, but generally our customers pay a reference audio provider to generate acoustic fingerprints in a reference database using our software. We also are working on relationships with reference audio providers to generate pre-existing

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databases of TRM fingerprints.
In fact, not just working on relationships; have such relationships and have done so in certain instances.
Q What databases have you generated?
MR. BORKOWSKI: Objection, misstates the witness's testimony as to databases that he generated. You can answer the question.

THE WITNESS: It's kind of a -- what do you mean, what databases have we generated?

BY MR. LAPPLE:

Q You said that you have relationships with -- I'm sorry, I can't remember the term that you used.

A Reference audio providers, such as Loudeye or Muse.

Q That through those relationships you have developed reference databases, pre-packaged?

A Well, in some cases, for example,

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Napster as a Relatable customer had rights under their license to generate reference fingerprints, which they chose to do, I believe through Loudeye. Loudeye has a very large database not of acoustic fingerprints but of reference audio. So for them it was a process of running our client's software across that large database of tracks and creating a reference audio database for Napster's needs.

Q Does that reference audio database that was created for Napster's needs still exist?

MR. BORKOWSKI: May call for speculation.

THE WITNESS: I'm not sure of the status of all Napster's assets, but I believe such a database exists.

BY MR. LAPPLE:

Q How long did it take to create that database?

MR. BORKOWSKI: May call for

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speculation, vague and ambiguous as to what database we are referring to.

THE WITNESS: I don't recall. I don't really know, actually. It was work that Loudeye was contracted to fulfill. How long it took them, I'm not sure.

BY MR. LAPPLE:

Q How long does it take to compare a generated fingerprint from the client -- I'm sorry, is there a better term I can use to describe that?

A Just to generate a fingerprint, because generating a fingerprint always happens in a client software application. Whether that's integrated with, for example, a P2P client application or it's a separate client ap that is delivered for bulk fingerprints, we call that bulk generation, such as what Loudeye used. The time to generate the fingerprint is equal for both.

Q How long does it take to compare a client generated fingerprint to a reference

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database fingerprint?

A That depends on the variant, but that is actually -- there are three key criteria for acoustic fingerprinting:

Accuracy, speed and scalability.
Accuracy is obviously important. If you are going to identify the audio, you have to be accurate. But what is often overlooked is the importance of how fast this process takes to query the central reference fingerprint database.
Relatables TRM-B is capable of doing those queries at a rate in the thousands of second per TRM server, which is about analogous to hundreds of or within 200 microseconds per query in internal tests.
Q What do you mean by internal tests?
A I believe that that figure, 200 microseconds per query, is from an internal test that Relatable conducted for the technology, but the basic point is that the

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speed and scalability of the Relatable TRM-B client server application is in the thousands of queries per second.
Q How many thousands of queries per second?
A That depends. That varies according to the size of the fingerprint database.
Q What was the size of the fingerprint database that was used in your internal test?
MR. BORKOWSKI: Assumes facts not in evidence. You can answer.
THE WITNESS: I believe that that

fingerprint database was approximately a million fingerprints. I would like -- I did not conduct that test, and my CTO would be more familiar with the exact figures for the benchmark.
BY MR. LAPPLE:
Q So it takes approximately 200 microseconds for a comparison to a one

Page 70

million fingerprint reference database?
A Yes, and that would be almost 5,000 queries per second in that internal test, but when you do internal tests of this type of technology to equal that in a real world environment, it is usually not exactly the case, but nevertheless, in real world conditions we were able to see query rates in the thousands of queries per second.
Q How man thousands?
A I think again that that depends on the size of the fingerprint database.
Q What was the best one you saw?
A Actually my role with Relatable is not technical, so I did not perform these types of tests. I'm also bound by confidentiality agreements that are in force with my customer, so I can't provide substantial details on all the internal tests. Excuse me, all the tests with Napster.

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Q So these were tests with Napster where this real world data was generated?
A Yes.
Q So when you say 5, 000 queries per second, do you mean that 5, 000 client generated fingerprints can be compared against the one million fingerprint reference database in one second?
A Yes. It is important to state that in real world implementation, mileage may vary according to the size of the fingerprint database. Nevertheless, these figures are orders of magnitude greater in terms of speed than what I believe some competing solutions have quoted. We were able to, in a real world environment, through our Napster implementation, prove that we could meet those types of performance criteria.
Q So if there were 10,000 queries submitted, it could take about two seconds under your internal testing?

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MR. BORKOWSKI: Lacks foundation. You can answer.
THE WITNESS: I think they way -- I'm not the CTO and not the technical person, but the way to handle the higher query load is to expand the size of the cluster that handles, because the TRM server handles, as I say, thousands of queries per second, but you can double the amount of

queries per sec that you can handle simply by adding another computer.
BY MR. LAPPLE:
Q How is that done?
A Simply by adding another TRM server to the system, to the infrastructure.
Q That has a duplicate of the reference database that's being used?
MR. BORKOWSKI: Objection, lacks foundation.
THE WITNESS: There's parts of this architecture that are proprietary, but the TRM servers that handle the query loads

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that I'm discussing are piece-wise scalable, meaning doubling the number of servers available to handle queries doubles the numbers of queries that you can handle.
BY MR. LAPPLE:
Q Your CTO told you that?
MR. BORKOWSKI: Objection, misstates his testimony.
You can answer the question.
MR. LAPPLE: All right, I'll rephrase it.
BY MR. LAPPLE:
Q How do you know that?
A I know that through my interactions with my CTO and my engineering team.
Q Have you ever done a test of it with two TRM servers?
A TRM has been integrated in tests

with many servers.
Q How many?
MR. BORKOWSKI: Objection, vague

* * * *

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A I believe that was the explanation I just gave. However, TRM is, in this implementation that we are discussing now, is a client server technology. It's necessary for the client to communicate with the server. The server is where the fingerprints are stored and matched to execute the type of file identification that is necessary for this type of implementation.
If the server cannot store and handle many millions of fingerprints and simultaneously deal with queries from potentially millions of users, then it simply won't be effective. So the purpose for designing a very scalable system is to accommodate a massive network such as a peer-to-peer network.
Q How is the TRM system designed to be scalable?
MR. BORKOWSKI: Objection, asked and answered.

* * * *

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is a goal. It's a design goal.
Q Right. How is that goal achieved?
MR. BORKOWSKI: Objection, asked and answered now twice, I think. How many

different ways are you going to ask the same question and get the same answer from him?
Do you have anything to add to your previous answers?
THE WITNESS: I don't think I do.
BY MR. LAPPLE:
Q Are multiple copies of the reference fingerprint database maintained in this scaled-up system?
A Generally I believe so.
Q Is it one copy of the reference fingerprint database per server?
A I believe the details of our server architecture are highly proprietary. I would reiterate, though, that I'm probably not of the technical proficiency to explain it.
Q When a client generated

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fingerprint is compared to a reference database fingerprint, how is that comparison performed?
MR. BORKOWSKI: Objection, vague and ambiguous. You can answer.
THE WITNESS: I think that that continues into highly proprietary technology solutions.
BY MR. LAPPLE:
Q Does that mean that you are not going to tell me or you don't know?
A I'm probably not the best person to answer that question, but it's also trade secret.

Q We have a confidentiality order in place and your entire transcript is confidential. It's not going to be disclosed publicly. Are you still going to refuse to answer?
A Would you please rephrase the question? I'm not sure I can answer it, but if you please rephrase the question.

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Q When a client generated fingerprint is compared to a reference database fingerprint, how is that comparison performed?
A A reference fingerprint database contains potentially many millions of reference fingerprints. Each fingerprint is unique to each sound recording that it represents.
If a client fingerprint generation process takes place and sends that fingerprint to the central server, the TRM server will match it with the exact fingerprint of that unique recording in the reference database.
Q How does it match it?
A Are you asking me to describe our match algorithms?
Q Yes.
A I would say that I don't have the technical proficiency to answer that question, and I believe it to be highly

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proprietary.
MR. BORKOWSKI: Putting aside the proprietary nature, though, are you unable to answer the question about the match?
THE WITNESS: I can't really answer that level of detail about how the matching takes place.
BY MR. LAPPLE:
Q Would your CTO know how that works? Would he be able to answer that question, again, setting aside the confidentiality part?
A I believe he would be very interested in protecting the confidentiality of that match algorithm, but he is the one who invented it.
Q Do you know if your match algorithm requires that the client generated fingerprint be an exact duplicate or an exact match of the reference database fingerprint?
A Yes. In order to be effective it

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has to match.
Q 100 percent match?
A If the match algorithm succeeds in identifying the recording in each subsequent instance of encountering the recording, it is exact.
Q Maybe you are not the right person to answer this, but I guess my question is, does every single bit of the data in the

client generated fingerprint have to match exactly to every single bit in the reference database fingerprint?
A I don't think I'm the right person to answer that question.
Q In the testing you did in your internal test, what match rate did you get?
MR. BORKOWSKI: Object, vague and ambiguous as to what you mean by match rate.
THE WITNESS: What do you mean by match rate?
BY MR. LAPPLE:
Q How many files were fingerprinted

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on the client side during your internal test?
A I don't know the answer to that question.
Q So you don't know how many fingerprints on the client side were compared to the one million fingerprint reference database in your internal test?
A I'm not completely familiar with the process and procedure of running that test, so I'm probably not the right person to answer that question.
Again, an internal test is an attempt to simulate as closely as possible the real world circumstances one would encounter with the same technology. So it's a benchmark, such as similar benchmarks our competitors might use, where they establish that theirs could handle one query per

second or two queries per second or 20 queries per second.
Seeing as in internal tests we

Page 84

were able to attain 5,000 queries per second, it was very clear that we performed orders of magnitude better than competing solutions. Given the size of the Napster network, that was a very important criterion to fulfill.
Q During your internal testing did you ever come up with any false positives?
MR. BORKOWSKI: Please be sure you understand the definition of false positive.
THE WITNESS: Would you define -- give me your definition of a false positive, please.
BY MR. LAPPLE:
Q Sure. My definition of a false positive would be where a client generated fingerprint is compared to the reference fingerprint database and comes up or is evaluated by the software as matching a fingerprint in the reference fingerprint database, when in fact it is not the same song as the reference fingerprint database.

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MR. BORKOWSKI: That's asked and answered and the record speaks for itself.
THE WITNESS: Actually to a large extent I said that that was highly

proprietary trade secret information. That it is achieved is what I'm explaining. I think that that fact is more important.

BY MR. LAPPLE:

Q Have you ever said that adopting fingerprinting on a Napster size database would be a "major technical challenge?"

A I believe I did. Can you tell me where you see that quote?

Q Yes. It's in an article in the Industry Standard on April 20th, 2001.

A It's an unprecedented engineering feat.

MR. BORKOWSKI: There's no pending question now. Why don't you just wait for his question.

BY MR. LAPPLE:

Q Sorry, what were you going to say?

• • • •

Industry Standard on April 20th, 2001.

A. It's an unprecedented engineering feat.

MR. BORKOWSKI: There's no pending question now. Why don't you just wait for his question.

BY MR. LAPPLE:

Q. Sorry, what were you going to say?

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BY MR. LAPPLE:

Q. Have you ever said that adopting fingerprinting on a Napster size database would be a "major technical challenge?"

A. I believe I did. Can you tell me where you see that quote?

Q. Yes. It's in an article in the

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David C. Hyman
October 7, 2002

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A. You would probably get links to streaming live media, or other enhanced content.
Q. With regard to the MP3 recognition technology we were discussing; the version that Winamp is using: Is there anyone using a more advanced version?
A. No.
Q. So if I use Winamp, for an example, I'm getting the state of the art, as far as what is out there in the world?
MR. BORKOWSKI: Objection. Misstates the witness's testimony.
THE WITNESS: As far as what is out there?
MR. PAGE: Q. As far as your software, what is in use in the world?
A. That's the best one that's been deployed. We have better stuff, but nobody has licensed it because it costs a little more money. They don't need that critical level of accuracy. 90 percent is good enough.
Q. Let's talk about the better version that is not out there yet. How does it differ from the version that Winamp is using?
A. Well, there's a lot of different things we can do, okay? But one version that we could deploy is one that uses what we call "wave form analysis," or a lot of people often refer to it as "audio

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fingerprinting" -- where we actually analyze the audio

file, and generate a mathematical signature based on that audio file.
Q. You say "could deploy." By that do you mean you haven't yet deployed it?
A. Internally we have.
Q. Have you built a database of audio fingerprints?
A. We're building one. We're kind of building it organically right now. However, we have a number of customers -- not actually customers, but there's a few different companies we have identified that can provide us a database tomorrow, if we needed one.
But we don't have any commercial applications today that would really benefit. We have a whole host of different applications we plan on deploying wave form analysis in. For example, recognizing terrestrial radio, and data cleanup for people's hard drives -- which we call "retagging." So you've got a bunch of messy files on your hard drive, we can deploy a fingerprint database, and clean everything up on your hard drive.
But if we had a customer tomorrow, we could get a very comprehensive database tomorrow. Our business model right now we don't have a customer, and

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we would rather build one slowly and organically, and have to pay.
Q. Let me see if I understood that. You don't currently have a fingerprint database, but you have a database that you could license upon need; is that right?
A. We have a database, but for the purposes of, I think, what you are thinking about, it is not

comprehensive enough. But we would have access; we do have access to a very comprehensive database.
Q. Which database is that?
A. I don't know if I could state company names. There's a few different companies we could get the database from: anybody who has got large databases of encoded audio. They just don't have have the algorithms or the technical know-how to deploy a system like this, so they would charge us a fee to run our algorithm over their database.
But I would say mid-03, without even using them, we will have our own comprehensive database.
Q. How are you going about creating this comprehensive database of your own?
A. A number of different ways.
Q. Start with the first one.
A. Getting audio; getting CD's, and encoding

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them.
Q. So you are just going out and buying every CD in the world?
A. That's one way we might build it. We might also build it through our SDK, where we actually can generate signatures when people use our SDK in media players. An end user would encode an audio file, and it would generate a signature and kick the signature back to our database.
Q. And how would you determine the validity of that signature?
A. Because they are sticking a CD in, and we know the TOC, and our CD recognition is 99 percent or higher accurate.
Q. So you would simply sort of piggy-back on the

users to send you fingerprints?
A. Yes. Of course with, you know, proper disclosure upon registration.
Essentially it enhances our recognition.
MR. von LOHMANN: Can I ask a couple of questions on that?
MR. COATS: It gets too confusing if questions are coming every which way.
MR. PAGE: Q. In that answer you said "We could do this," or "We could do that."

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My question is, what are you currently doing to build your database of fingerprints?
A. We haven't started. We have a database internally, just from CD's that we have purchased for the testing environment.
Q. But you haven't done anything about building a commercial fingerprint database?
A. No.
Q. Have you licensed your wave form recognition software to anyone?
A. No.
Q. So I assume that it has not been deployed anywhere. Well, where did you get the fingerprint recognition technology?
A. We bought a company.
Q. What was the name of that company?
A. Cantametrix.
Q. Do you know if Cantametrix licensed its wave form recognition technology to anyone, prior to your acquisition of Cantametrix?
MR. BORKOWSKI: Calls for speculation; objection.

MR. COATS: His objection just said "calls for speculation." He has the right to make objections on the record, because he's counsel for one of the

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parties in this case.
THE WITNESS: Okay, I believe that they did license it. There was a company in England call "Whip-It," I believe. It is a peer-to-peer network for classical music.
MR. PAGE: Q. Assuming you characterize Devo as classical.
Do you know how to spell "Whip-It"?
A. I believe it is W-H-I-P, I-T.
Q. Do you know if Whip-It ever made commercial use of the wave form recognition technology?
MR. BORKOWSKI: Objection. Vague and ambiguous, and calls for speculation.
THE WITNESS: I don't believe so. I believe I would be more aware of it if it was employed.
MR. PAGE: Q. Do you know if Whip-It still exists?
A. I have heard recently in my office; I have heard their name, and there has been some talk, but I don't really know the details.
Q. So as far as you know, the technology was not deployed by Whip-It?
A. I really have no idea.
Q. With your wave form recognition technology, do you know how large a sample of the audio file your

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results.
Q. Have you done any testing on the amount of time it takes to do a lookup of a fingerprint supplied by a client in a large database?
A. Yes. The size of the fingerprint is roughly the same as the size of our TOC. Okay? And our TOC is less than a half a second to actually cross-reference the database and do the lookup.
Q. But you haven't built a large database of fingerprints; is that correct?
A. No. But they are the same size as our TOCs, and we have built a very large database of TOCs.
Q. So the assumption is a large database of different data would have roughly the same search speeds?
A. Correct.
Q. A TOC pertains to an entire CD; right?
A. Correct.
Q. So if you were to build a database of individual song ID's, it would be --
A. 20 times bigger.
Q. And therefore take 20 times longer to search?
MR. BORKOWSKI: Objection. Lacks foundation.
THE WITNESS: Not really. there's very advanced server matching code.

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By the way, we do MP3 matching on text. Okay, we have a text database. That is probably more processer intensive than matching a wave form signature. And we do the MP3 text matching in less than a second.
MR. PAGE: Q. How may MP3's do you have text entries for in your database?

A. 20 million. Over 20 million.
MR. PAGE: Let me mark as Exhibit 1 your declaration.
(Document referred to herein marked for iden. Exhibit No. 1)
THE WITNESS: Do you want me to look at it?
MR. PAGE: Yes.
THE WITNESS: (Examining document)
MR. PAGE: Q. The first question is, "Do you recognize this document?"
A. Of course.
Q. And is this the declaration that you signed on September 5?
A. Do I need to re-read the whole thing?
Q. Only if you have some doubts.
A. Appears to be the same.
Q. Who wrote this declaration?
A. I wrote it, along with my general counsel, and Bill Coats.

Q. Did counsel for any of the plaintiffs in this action have any input into the content of the declaration?
A. None whatsoever.
Q. When were you first contacted by plaintiffs in this action? In connection with this declaration.
A. I don't remember the exact date. Roughly a month ago; three weeks to a month ago.
Q. And how did that first contact come about?
A. Somebody who was representing RIAA -- I don't remember which firm; firm names are too long for me to remember. But somebody contacted me, and I referred them to my general counsel.

Q. And who is your general counsel?
A. Dave Marglin. M-A-R-G-L-I-N.
Q. Were you involved in any of the discussions between your general counsel and the attorney you contacted?
A. Was I involved in the discussions between Dave and the attorney?
Q. Yes.
A. Well, I was asked if I wanted to make a formal declaration, and I said, "Well, you know, we can't track" -- you know my purpose is not to shut these things down, but to help enable them, because I

think peer-to-peer is a fantastic technology. But for the purposes of saying "Can we track?" Yes, I believe we can track. And I said "I will make you a declaration."
Q. You say you think peer-to-peer is a fantastic technology. Why do you say that?
A. The ability to share music with others; personal tastes; finding people like you; band width constraints. For a lot of reasons I think it is very interesting technology.
Q. When you use the term "track," what do you mean?
A. Music, specifically.
Q. I didn't mean "What do you track?" What is it you are describing as "tracking"?
A. When I said "track," I mean song title.
Q. Do you make any distinction between tracking and blocking, or filtering?
A. Oh, I see what you mean.
I do make a distinction. They are two

different things.
Q. And do you think tracking and filtering are equally feasible?
A. Yes. Compensating artists is another issue. Tracking and blocking to me is the same

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Q. Explain what you mean by "ownership issues"?
A. Gracenote specifically said that "We own the signatures." I think we were not going to provide them with -- let me refresh my memory.
They would own the signatures, but it was our metadata, okay? That combined gave them something that they could use. But upon breakup, we wouldn't enable them to build their own wave form signature database that we didn't have ownership in.
Q. So if you were going to do this, you wanted to have the ability to then re-market it elsewhere; is that essentially --
A. Yes.
MR. COATS: Just be patient. Let him get done. Otherwise the court reporter is going to get very angry.
MR. PAGE: He'll turn around and start kicking.
Q. Let's talk about the system you did deploy with Napster. Can you describe it to me?
A. From the best of my recollection, we provide them with text, artist and album pairs. And we not only provided them the names of the songs that they were asked to block, but all the variants in spellings. Because one of the ways our database is built is from

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user submissions, and we have all the variance in spelling. So they came to us asking for our help. We told them we could help them.
Q. Let me see if I have that right.
In Napster, the labels provided a list of titles and artists to be blocked; is that correct?
A. Correct.
Q. And was your role to take that list and expand it out to cover variations in spelling, and basically massage it into more usable form?
A. Correct.
Q. And did you in fact do that?
A. Yes.
Q. And did Napster in fact deploy that system?
A. Yes.
Q. What happened to that system?
A. It was very effective. It pretty much was the medicine that killed them.
Q. Do you know whether the district court in fact found it very effective?
MR. BORKOWSKI: Objection. Calls for a legal conclusion; calls for speculation; argumentative.
THE WITNESS: I really don't.
MR. PAGE: * * * Q. How much did you get paid by Napster?

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Q. These were various individual tests?
A. Yes.
Q. Putting aside Cantametrix, which of the other

three did you believe to be the best algorithm?
MR. BORKOWSKI: Objection. Vague and ambiguous and calls for speculation; lacks foundation.
THE WITNESS: I can answer the question.
It depends on the application. Some are better than others, depending on what you want to do.
MR. PAGE: Q. Okay.
A. So for noise filtering, Philips was really good. For something that is very fast and accurate, when you are not doing it through a cell phone or terrestrial radio, we felt that Cantametrix was the best.
Q. Did you think Relatable's was the best on any metric?
MR. BORKOWSKI: Objection. Lacks foundation.
THE WITNESS: I don't recall a lot of details, but I remember it getting better.
MR. PAGE: At least they are moving in the right direction.
MR. BORKOWSKI: Move to strike.
MR. PAGE: I'll withdraw it.
Q. Take a look at Paragraph 5 of your

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declaration. You start by saying, "In the course of my work at Gracenote, I have become generally familiar with P-to-P systems and how they work."
Can you describe the ways in which you have become familiar with Grokster's P-to-P software, if any?
MR. COATS: The ways in which he learned about it, or what he learned about it?
MR. PAGE: I'm using his term. He says "became generally familiar with."
MR. COATS: Okay.

THE WITNESS: Are you asking me how have I become familiar?
MR. PAGE: Yes. With Grokster.
THE WITNESS: With Grokster?
MR. PAGE: Q. If you have.
A. My knowledge is that it works on the Gnutella network. I have studied the Gnutella network, and how it works. We have done internal testing of the system.
Q. Describe the internal testing you have done of the Grokster system.
A. I can't get into technical details, because I don't know.
Q. Who, if anyone, did the testing of the Grokster software?
A. I can't answer that. I know there has been

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testing of Gnutella; I'm not sure which incarnation. Might be Grokster; might be all of them. Might be one of them.
Q. What P-to-P systems are you familiar with?
A. That's a vague question. Familiar? How familiar? From what I read in the newspapers? Or the intricate mechanisms; their source code? How they market themselves?
Q. Are you done?
A. Yes, I'm done.
Q. Your declaration says, "I have become generally familiar with P-to-P systems."
What do you mean by you have become generally familiar with them?
A. Generally familiar from what they do; what they enable.
Q. Have you ever used any of the P-to-P software

at issue in this litigation?
A. I have participated in tests internally.
Q. What internal tests?
A. Usage of the system; of systems.
Q. Which software are you referring to?
A. I honestly don't recall, but I know that I have tested both systems in Gnutella and Fastrack.
Q. I don't understand what you mean by you have

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tested both systems in Gnutella and Fastrack. Can you explain what you mean?
A. I have used a peer-to-peer network that works on the Fastrack protocol. And I have used peer-to-peer systems that work over the Gnutella network.
Q. But you don't know which ones; is that correct?
A. I know for a fact Lime Wire and Morpheus and KaZaA. I don't recall a Grokster.
Q. In using Lime Wire, Morpheus and KaZaA, what did you do?
A. Downloaded a file.
Q. What file?
A. I don't remember.
Q. Did you do anything else, other than download a file?
A. Played the file.
Q. Anything else?
A. No.
Q. You then go on to say, "Using a combination of unique identifiers, text matching and audio fingerprinting techniques, in conjunction with the vast CDDB database, Gracenote has the proven ability to deploy systems and services for P-to-P networks."

What systems and services for P-to-P networks

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any claim in the pending Napster bankruptcy proceeding?
MR. BORKOWSKI: Can I have it read back?
(Record read)
THE WITNESS: No. They fully paid us for their services.
MR. von LOHMANN: Q. Has Gracenote taken any steps in connection with the database or other information assets that Napster has generated, in connection with your relationship?
A. None.
Q. Returning for a minute to the creation of the wave form analysis fingerprints: Does the process of creating those fingerprints require the reproduction of the music being fingerprinted?
MR. BORKOWSKI: Vague and ambiguous.
THE WITNESS: I lost you.
MR. COATS: Yes, can you try again?
MR. von LOHMANN: Sure.
Q. As I understand your earlier testimony, a fingerprint is created for each particular song by running an algorithm over the song. Is that correct?
A. Correct.
Q. The word you used was "running the algorithm over the song." I am asking, exactly what does that entail? Does the song get copied, whether in RAM or in

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a buffer or cache of any kind, in the course of creating

the fingerprint?
MR. BORKOWSKI: May call for legal conclusion.
MR. COATS: I think that it is probably outside his expertise, but go ahead and answer, if you can.
THE WITNESS: For the purposes of a system like this, we would expect the content owners to provide us with the audio, and we would run -- or some permissive use of the audio -- to run our algorithm over that audio.
MR. von LOHMANN: Q. Have any major copyright owners come forward with the audio, as you described?
A. No.
Q. You mentioned that there were third parties who had databases that you could use to create these fingerprints. Are you aware of any of them who have been authorized by major copyright owners to offer you their databases for that purpose?
MR. BORKOWSKI: Calls for speculation.
MR. COATS: Calls for speculation.
THE WITNESS: No, not aware.
MR. von LOHMANN: Q. Have you entered into any licensing negotiations with major copyright owners,

seeking to obtain the audio that you would need to create the fingerprints?
A. You mean do the content owners ask us for their audio?
Q. No, have you asked them for their audio?
A. No, we don't even ask them for CD's.
Q. Fair enough.
You mentioned that Gracenote has patents --

both business method patents, as well as at least patent applications, regarding the wave form analysis function. Is that correct?
A. Yes, we have, I believe, seven to nine patents issued. Some are technology patents; some are business method patents.
Q. And you have also testified -- or you have said in response to Mr. Page's questions, that you have been involved in litigation against both Music Match and Roxio in connection with those patents; is that right?
MR. COATS: In connection with those patents? Well, different patents.
THE WITNESS: Well, the patents that have issued.
MR. PAGE: Q. Do you have any position on whether any of your competitors' audio fingerprinting technology violate your patents?
* * * *

Deposition of
Vance Ikezoye
September 18, 2002

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application that is managing our handling a piece of content.
Q. When that software goes to examine -- let's take, as an example, an MP3 file of a song, what portion of that MP3 file does the software examine in order to create the fingerprint?
A. It is determinable by our software.
Q. What applications are currently using your software to create fingerprints?
A. Our RepliCheck service; our CD replicator services; our broadcast monitoring services.
Basically that is the foundation of all our products and services
Q. So is your software currently being used by any peer-to-peer file-sharing software?
A. It is not.
Q. Let's take first the example of broadcast monitoring. I know you guys are doing broadcast monitoring for certain rights organizations and -- for example, KFOG -- since it is local, we'll take that one.
Where is the software that's doing the broadcast monitoring on KFOG located?
A. In our office.
Q. So you are doing that internally, and you are just taking a stream of KFOG and generating the

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anything in our database."

Q. And wouldn't that happen fairly often, in a situation where the people doing the checking are releasing new masters of new music?
A. Repeat that question again.
Q. Let me ask it a better way. Let's actually go at it from how your reference database is built.
How is your reference database built?
A. We take samples of audio from authoritative sources, and use both -- we generate fingerprints from the content, and take audio -- metadata -- from those sources as well.
Q. What are "authoritative sources"?
A. A record label directly sending us content, we feel is authoritative. We also have an agreement with Loudeye Technologies, which has agreements with the labels. The labels send them content, and they do the processing for us.
Q. Let's talk about Loudeye. What is the Loudeye database?
A. Loudeye doesn't -- well, they have a database of metadata, which is, for a particular song, the title, artist and album that corresponds to it.
Q. Does Loudeye also have copies of those songs?
A. Yes.

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Q. Well, let's take Loudeye before you started working with them. I just wanted to get a sense of what the database was, pre-Audible Magic.
Loudeye had actual copies of music and associated metadata that they generated; is that correct?
A. That's correct.
Q. And was that by manually they would get a

song; somebody types in the artist, title, etc., and associates it? It that how they did it?

MR. GELBLUM:If you know.

MR.PAGE: Q. If you know.

A. Yes, that's what they do.

Q. So at some point you entered into an agreement with Loudeye to populate your database; is that correct?

A. Correct.

Q. And at that point Loudeye had servers that had a bunch of songs and associated metadata.

A. Correct.

Q. Did they simply provide that to you, for you to do fingerprinting?

A. No.

Q. So did you provide your software to Loudeye, for Loudeye to also generate fingerprints?

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A. Yes.

Q. And did Loudeye then provide to you those fingerprints and the associated metadata?

A. Yes.

Q. Did they provide to you also copies of the music?

A. No.

Q. How many songs are there currently in the Loudeye database?

A. In the Loudeye database? I don't know.

Q. Has Loudeye produced everything for you in their database?

A. I believe substantially, yes.

Q. When you say "substantially," what haven't they provided you?

A. There is always new content coming in; may not have caught up. There may be some other content that they haven't gotten to fingerprint yet.

Q. As to content that's not new, is it your understanding that Loudeye has fingerprinted all of it, and provided it to you?

A. I don't know that; the answer to that.

Q. Do you have an estimate of how many titles Loudeye has provided metadata and fingerprint information for?

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A. Over three million.

Q. What is your understanding of the scope of Loudeye's database.

A. Their data covers the five majors and over 500 independents. They say that they cover the North American catalog of available music.

Q. By "available," you mean released by one of the labels that provides data to them; is that correct?

A. No. "Available," meaning what is available for purchase today.

Q. What sources of content does Loudeye have, other than the labels that provide music to them?

A. I don't know.

Q. So am I correct in assuming that Loudeye's database does not include music that has not been released for sale by a label?

MR. GELBLUM:Object to all these questions about what Loudeye does or has, on the grounds that it calls for speculation.

If you know the answer, you can tell him. Obviously you don't work for Loudeye.

THE WITNESS: Repeat your question.

MR. PAGE: Q. Am I correct in assuming that Loudeye's database does not include music that has not been released for sale by a label?

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A. I don't know the answer to that.
Q. Do you have any reason to think that Loudeye has incorporated into its database any music that has not been released for sale by a commercial label?
A. You asked do I have reason to believe?
Q. Yes.
A. Yes. Because labels send them content pre-release.
Q. That's a good distinction.
Do you have any reason to think that Loudeye has incorporated into its database any music that has not been acquired for release by a commercial label?
A. I didn't understand that question.
Q. Let me see if I can rephrase it.
From your previous answer, you indicated that Loudeye, in addition to having music that has been released for commercial sale, also has in some instances music that labels have sent to them pre-release.
A. Correct.
Q. Other than music that has been released for commercial sale by a label, and music that has been sent to Loudeye pre-release by a commercial label, do you have any reason to believe that Loudeye has other music in its database?
A. I don't know.

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Q. Let me see if I understand this.

In the case of TV content, your fingerprint is based on the audio track of that content; correct?
A. Correct.
Q. You don't separately analyze video?
A. Not today.
Q. Let me go back to the process.
If I understand your testimony, your software is not today being used in any file-sharing software?
A. Correct.
Q. Let's talk about how it would work if it were incorporated into a piece of file-sharing software.
I assume you would provide to the software vendor an API that would have allowed them to build in your functionality to their product; it that correct?
A. A "software vendor," meaning --
Q. Someone who is writing a file-sharing program.
A. Yes, we would provide a software library and an API, that they would write to and integrate this file identification functionality into, yes.
Q. Let's suppose I am starting a new company, or I'm just sitting at home, and I want to do this, and I'm going to take a public source new teleprogram, and I want to add this software. I bundle it in, and I give

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it to an user, and the user is now running it on their computer.
What do you envision being the process that that software would go through, in fingerprinting and confirming and checking files?
A. Just to identify the file, irrespective of anything else?
Q. Right.

A. The software application would tell our library what file or buffer to -- that the application was interested in knowing what the identity was. It would then basically pass that file to our software; our software would generate a fingerprint.
Q. When you say "our library," you are talking about the code on the user's computer; is that correct?
A. That's correct.
Q. Let's suppose we have a hypothetical user. He's got a hard drive with on hundred files.
What files would the application tell your library to examine?
A. Ask that question again.
Q. Le me strike that. Let me go at it a different way.
Your library: What sorts of files can it fingerprint at present?

A. Today it can fingerprint wav; MP-3; RealAudio and ASF -- Windows Media Player; Windows Media Audio.
Q. What happens if your library is asked to fingerprint a file that has digital rights management protection on it.
A. We wouldn't be able to read it, unless we integrated that digital rights management software into our library.
Q. What happens if your library is asked to fingerprint a file with an extension other than the -- I believe four you identified?
A. It would depend on how the application would pass the information. But my understanding is that even if the file extension was not correctly corresponding to what the file format really was, we could still read it

and identify it.
Q. At what point in the operation of this file-sharing software -- this hypothetical Gnutelia client, built with your software in it -- at what point in the operation of that software would the fingerprinting take place?
A. That's a --
Q. Does that make sense?
A. That's a weird question.
MR. GELBLUM: What do you mean by "at what

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Q. Let me ask you a question: Has Audible Magic ever built a Gnutella client, with your software built into it?
A. No, we have not.
Q. Do you know anybody else who has?
A. No.
Q. Have you ever built any peer file-sharing software with your software built into it?
A. Yes.
Q. What software is that?
A. We built a Gnutella client -- I mean a Napster client; excuse me.
Q. Do you literally mean a Napster client, as opposed to an open Napster client?
A. It worked on the Napster network.
Q. Did you obtain any license from Napster to do that?
A. It was an open source client
Q. When you built this client, was it filter-in, or filter-out?
A. It was filter-out.
Q. So if I understand, this was a client that

would share the content, unless it matched an entry in the database saying it was not to be shared?
A. No, it worked on the download side. And what

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it would do is when somebody started to download a file, we would do an identification while it was downloading, and if it was found in our database we would stop the download.
Q. So if I'm a Napster user and do a search for Beatles; I click on Yesterday; I start downloading it -- you would fingerprint the front end of that as it came to me?
A. Correct.
Q. And send it of to the database?
A. Correct.
Q. And if it matched something in the filter-up database, the application would terminate the download?
A. Correct.
Q. Have you ever built a file-sharing client that used filter-in filter?
A. We have not.
Q. Why not?
A. It is not our business.
Q. I understood that you were proposing your technology as a solution for both filter-out and filter-in file sharing.
A. Yes, and our functionality is available today to be included in either system. We don't build the application; the Gnutella application, but we have the

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functionality today that can be integrated.

Q. So I still have trouble understanding how filter-in would work.
Suppose I built a Gnutella client; set it up for filter-in, where it won't allow me to share anything that doesn't show up in your database. I then take a microphone and record my voice, singing in the shower. Your system will preclude me from being able to share that with anyone else, won't it?
A. That's correct. If it is a filter-in system; not our software.
MR. GELBLUM: Which is probably a good thing.
MR PAGE: There is a public policy argument here, I recognize.
Q. Let me see if I understand this.
From a technological standpoint, it assumes like -- seems we have identified a matrix of four different ways to approach this problem, which is filter-in or filter-out, and on the sharing or the downloading side.
Is that correct?
A. That's correct.
Q. On the downloading side -- would require essentially treating the download like a piece of streaming audio, and cutting it off if it matches a

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Q. Have you ever conducted any tests of the ability of Audible Magic's technology to handle large-scale peer-to-peer file identification?
A. No.

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Q. Do you have any plans to.

A. Not at this point.
MR. PAGE: Let me mark Exhibit 1.
(Document referred to herein marked for iden. Exhibit No. 1)
MR PAGE: Exhibit 1 is a seven-page document entitled "Declaration of Vance Izekoye."
Q. Is that your signature on the final page?
A. Yes.
Q. Who wrote this declaration?
A. The initial draft was given to me by Peter Gelblum.
Q. Do you have a copy of that initial draft?
A. Not with me.
Q. But do you have one in your possession?
A. Maybe.
Q. In Paragraph 1 you state that you are making this declaration "to demonstrate that contrary to the public statements by defendants, there are methods presently available to prevent unauthorized recordings" -- etc.
What statements are you referring to?
A. I have read personally statements in the press that have said that there have not been ways to filter out copyrighted content.

* * * *

A. Well, you would use fingerprints -- subset of those fingerprints -- for one system versus another. You would not use the same set, a reference database.
Q. Let me put it another way.
In the current universe of content on the Internet, in which the major labels have not licensed peer-to-peer systems, the data you have is primarily the set that is not authorized for sharing, rather than the

universe of content that the major labels and the independent labels don't control.
A. I guess I can't speak for the labels to say whether they are authorizing --
MR. GELBLUM:Assuming that the database he has has not been licensed for use under P-to-P, then would it be more appropriate for filter-out than filter-in?
MR PAGE: That's a fair question.
THE WITNESS: Say that again.
MR. GELBLUM:Mike is doing the questioning.
MR. PAGE: Let me change seats here for a minute.
Q. Assuming that the current state of the universe is that the major label have not licensed their content for sharing on a P-to-P system, the database you have is suitable for a filter-out system,

but not a filter-in system. Is that correct?
A. That's correct.
Q. Further down in Paragraph 10 you were discussing how one would use your software to implement a P-to-P system?
MR GELBLUM: Not to implement a P-to-P system. How it would be implemented.
MR PAGE: To implement file identification and protection on a P-to-P system.
And the last sentence that starts on Page 5, Paragraph 10 says, "Then, the company's fingerprinting software would be installed either on each user's computer, or on a server operated by the systems operator, e.g., Grokster or KaZaA."
Can you explain to me how it would work if

one put your fingerprinting software on a server operated by Grokster or KaZaA, as opposed to each individual user's computer?
A. In that case the content would have to be transferred somehow to the system operator server, where the fingerprint would be done; performed.
Q. Bring the mountain to Mohammed?
A. Correct.
Q. So in such a system, any time anybody wanted to share any file, it would first have to be transmitted

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You just mean not sharing it.
MR. GELBLUM:By disabling, does he mean not sharing?
MR. PAGE: Right. As opposed to erasing it, or making it so you can't play it yourself.
THE WITNESS: No, just now allowing it to share.
MR. PAGE: Q. In Paragraph 12 you say, "The Audible Magic technology can easily handle millions of requests for identification against a reference database."
I notice absent from that sentence is any identification of time. How long would it take the Audible Magic technology to handle millions of requests for identification against a reference database?
A. It depends on how large the reference database is.
Q. Assuming the current reference database of 3.5 million recordings, how long would it take for your technology to handle millions of requests for identification against that database?
A. Well, first, I don't think you would need 3.4

million.
But to answer your question, to run against 3.4 million is probably somewhere around half a minute

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to do a look-up of one song.
Q. A single lookup?
A. Yes.
Q. So a lookup of a million songs would take half a million minutes?
A. Say that again. No.
Q. Your testimony was that to run a lookup against the database of 3.4 million tales half a minute?
A. Yes.
Q. So to do a million lookups would take half a million minutes; correct?
A. No, ten seconds. You said 3.4 million songs -- takes 30 seconds. If you said a million songs, it is one-third the time, and so it is ten seconds.
Q. One of us is confused, and I have no idea who it is, so let me start over.
I send you a single fingerprint; you have a database of 3.4 million fingerprints.
A. Yes.
Q. How long does it take you to look up that single fingerprint against your database of 3.4 million fingerprints?
A. 30 seconds, about.
Q. So if I send you a million fingerprints, it will take you half a million minutes to look them all up

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against your database; correct?

A. It will take -- yes, half a million seconds; correct.
Q. One thing I forgot in the introduction was to tell you that you are free to ask me to take a break at any time. And I think it is a good time to take one.
A. Okay.
(Recess taken, 2:23-2:31 p.m.)
MR PAGE: Q. Did you want to add anything?
A. Yes. You had said "How many seconds," and those number of seconds is -- I think we said half a million seconds -- is assuming you had one process, or process supporting all -- supporting a million users. And then it would take that long.
But in actuality you would have many processors to support the number or users that you wanted, and then the result could be a half-second or second response time.
Q. So if you had a --
A. I mean 30-second response time.
Q. So if you had a million users, and a million processors, they could each process one file each 30 seconds?
A. That's correct. But you probably wouldn't do that, because -- you probably wouldn't do that

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random, as we were just going from point to point. It is not the entirety of your web site. We have added numbers in the lower corner to aid us in finding places in it.
Do you recognize this as being material from your current web site?
A. Yes.
Q. My first question: Who are these guys that

get to sit in front of the CEO in the picture?
A. Just we were at a picnic.
Q. On the first page, you say "Audible Magic's systems are used to modify, identify and track content usage across all media types."
You don't literally mean "all media types" there, do you?
A. You are correct.
Q. In fact, it is only over audio of certain formats; is that correct?
A. We track audio, but audio can be used to track video.
Q. So to the extent you have audio samples from the audio track of a video, you can track video?
A. That's correct.
Q. And other than video in that way, and the audio in the formats we have discussed, you are not able

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to track usage; is that correct?
A. That's correct.
Q. So you can't track text.
A. No.
Q. Or still images.
A. No.
Q. If you could turn to Page 2.
The Audible Magic P-to-P traffic monitor: Is this the application you discussed earlier, having acquired from ipArchive?
A. Correct.
Q. And does the P-to-P traffic monitor use your fingerprinting technology at all?
A. It can use it.
Q. What do you mean by "It can use it"?

A. Right now we haven't enabled that functionality in this application.
Q. So is this application essentially for IT department network administrators to determine what is going on on their network?
A. Today it is, yes.
Q. So for instance, I can find out if my employees are spending all their time downloading porn, instead of working?
MR. GELBLUM:Or illegal music files?

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A. Yes, but we have no customers.
Q. And isn't that also true as to your fingerprinting software for P-to-P services?
A. That's correct.
Q. Does it concern you that by offering the service, you may be offering assistance and support to people who are engaged in music piracy?
A. Yes, it does.
Q. But nonetheless, you are advertising the service?
MR. GELBLUM:Objection. Argumentative. It speaks for itself, together with his testimony.
MR. PAGE: Q. Let's go back to our hypothetical where we're building a P-to-P client that incorporates your fingerprinting technology, and suppose that we set it up as a filter-in system, where in order to share a file it must appear in the database of authorized content. And let's suppose we have millions of people out there using it.
What happens when your servers go down?
A. It depends on how the application has been designed.

Q. What do you mean by that?
A. Whoever writes the application can make the decision whether to continue to allow for sharing even

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without the data, or to stop sharing.
Q. If you built the application to allow sharing, even without the data, wouldn't it be possible to defeat your entire system simply by blocking access to your IP address?
A. I don't know about blocking to our IP address, but blocking to our servers, yes.
Q. So a system that only filtered in -- if it was allowed access to your servers, would be fairly easily defeated; correct?
MR GELBLUM: Objection. Vague and ambiguous by "fairly easily."
MR PAGE: I'll clarify it.
Q. If I built a system that allowed file sharing in the case where your servers were not available, wouldn't I be able to defeat that system simply by blocking the application's access to your service?
MR. GELBLUM:Object. It has been asked and answered, and I object to your insertion of the words "simply by" as if it is a simple thing to do.
He already answered your question without the "simply" by saying "yes."
MR PAGE: Q. Is your answer to that question without the simply "yes".
A. Could you repeat the question?

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Q. If I build a system that allowed file sharing

in the case where your servers were not available, wouldn't I be able to defeat that system by blocking the application's access to your service?
A. If the service was relying on that connection, and that connection to our servers, and that connection was blocked, yes.
Q. If I were to build a P-to-P system using your software, in a filter-in scheme, and distributed it to millions of people, what would happen to that system if you went out of business?
A. It would be dependent on how the contract was written with whoever we were contracting with.
If there was some provision to continue the service; somebody take over the service, it would be continued. If there was no provision and we went out of business, yes, the service would be stopped.
Q. So if, for instance, Grokster were to distribute a new version of its product with your software built into it, that was dependent on the operation of your database to function, if you went out of business, Grokster's only choice would be to take over operating the licensed database from you?
A. I don't know about if that's the only option.
MR GELBLUM: Right.

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What vendors were you referring to there?
MR. GELBLUM: What are you referring to?
MR. PAGE: The last two sentences of the second paragraph on 34.
THE WITNESS: In 2000 there were a number of companies that talked about and introduced audio fingerprinting technologies.
MR PAGE: Q. Who were they?

A. Cantometrics; Sonic Agent; there was one in Palo Alto; there was e-Tantrum -- probably half a dozen; I can't remember all of their names.
Q. Is Cantometrics still in business?
A. No.
Q. Is Sonic Agent still in business?
A. No.
Q. Is e-Tantrum still in business>
A. No.
Q. And in 2000 each of those announced that they had technology to solve the identification problem?
A. Yes, they had fingerprinting technology.
Q. Why isn't watermarking just as good as fingerprinting?
A. Because watermarking before the content you will need to embed a signal or a mark into the file. So it doesn't work well with legacy content.

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peer-to-peer network, where labels would be able to identify unsigned artists whose files are being shared a lot?
A. If the technology was applied to the peer-to-peer network -- can track trading, yes. You can use it to identify what artists were being traded.
Q. Move forward to Page 83, which appears to be a press release by Audible Magic on October 16, 2000.
Is that correct? Am I correct in understanding this was a press release?
A. Yes.
Q. There's a quote in this -- in the fifth paragraph -- from Malcolm MacLachlan:
"It is now possible to run a peer-to-peer subscription and still pay artists the correct amount of

16 money for their work. Consumers, in turn, can now be
17 guaranteed that the song they download is the one they
18 want, and will have a certain standard of sound
19 quality."
20 Did you believe this to be a true statement
21 in the press release of October, 2000?
22 A. We believed our technology could be used to
23 support this.
24 Q. In the two years you have put out this press
25 release has anyone, in fact, implemented your technology

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1 to do this?
2 A. No.
3 Q. The next paragraph says, "The technology has
4 been licensed and is in use today by a number of
5 companies, including Virage and the Bulldog Group."
6 What is, or was, Virage?
7 A. Virage is a company that does video indexing,
8 primarily for news programming.
9 Q. So it is a way to deal with the news bureau
10 with a hundred thousand hours of archival tape, and no
11 way to find anything in it?
12 A. Correct.
13 Q. I always wondered how they do that.
14 What is the Bulldog Group?
15 A. Bulldog Group provides tools -- audio
16 tools -- for audio manipulation; DSP work. Content
17 management applications; content asset management
18 systems. Things like that.
19 Q. So this is similarly sort of an audio
20 database manipulation application?
21 A. Yes.
22 Q. They use it to find things among a large

23 amount of audio data; is that accurate?
24 A. No. It is used to -- yes, identify and track
25 assets -- media; audio content assets.

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1 demonstration to Napster?
2 A. No, not of this. Not of this application.
3 Q. Why not?
4 A. We couldn't get them to talk to us.
5 Q. Whom did you attempt to contact?
6 A. The president and the chief technical
7 officer.
8 Q. Did they respond to you an any way?
9 A. We got one meeting with them -- this is
10 before the prototype -- and presented, and then after
11 that we had no contact.
12 Q. To your knowledge, did someone else in fact
13 get a contract with Napster to implement a
14 fingerprinting system?
15 A. Yes, my understanding is Relatable.
16 Q. Are you familiar with any of the results of
17 testing of the Relatable Napster system?
18 A. No.

* * * *

Deposition of
Leonard Kleinrock
September 27, 2002

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parameters like you mentioned?
A. This is 1.9 we're talking about?
MR. FABRIZIO: 2.0.
MR. LAPPLE: 2.0
THE WITNESS: Typically they're not involved.
MR. LAPPLE:
Q. Are they involved in any way?
A. Except for the control function I described earlier.
Q. You said "typically." I'm wondering if there's any atypical situation in which they are involved.
A. I can't think of any.
Q. Now, these search parameters that you say the central servers send to the client on an hourly basis, what are they, again.
A. One of them involves, as I said, the -- again, I'm not sure if it's 1.9 or 2.0 -- involves the ability to adjust the way -- It's a control function, flow control function. Flow control has to do with the way in which the queues are managed. They can select which form of search takes place.
Q. What do you mean by which form of search takes place?
A. As I said earlier, when there's things to be sent on an ongoing line, there are a number of

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different kinds of messages that need to go out, and it

determines in what order they are sent out if there's competition for like communications.
Q. Do they in any way control what the user is allowed to type in as a search?
A. What do you mean by "they"?
Q. The search parameters you've identified.
A. No.
Q. Do you know of any other search parameters or information that is sent from the central servers that can control what search a user types in?
A. So now we're talking about some of the filters that the user can invoke with support from the central server providing that functionality. If you consider that affecting the search, then the answer is "yes"; and if not, no.
Q. What are those filters, as you understand them?
MR. FABRIZIO: Let me object to that. It's vague unless we're specifying a specific client application.
MR. LAPPLE:
Q. Morpheus 2.0.
A. 2.0 has just been changed. I believe there's been an upgrade. And certainly there's the ability to type in key words which, if present in the query, can be filtered out.

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Q. How does the key word filter work in Morpheus 2.0?
A. I can only tell you at a top level, functionally it would look for those key words in the files that are to be received and would stop them from being shown to the user. It either operates on the query itself or on the received files. I forget which it is right now.

Q. This is something that the client application actually does?
A. Yes.
Q. Does to servers?
A. Correct.
Q. Do you know what algorithm it utilizes for key word searching?
A. No.
Q. Did you look at the code?
A. No, I myself did not look at the code.
Q. Do you know if Mr. Truelove or Mr. Eustice or Mr. Reieher looked at the code regarding key word filtering?
A. I don't know if they looked at the way the filtering was done?
Q. So they didn't provide any report to you or have any discussions with you about how it was done?

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A. Not about how it was done.
Q. Did they have any discussions with you at all?
A. Yes, that this functionality existed, the capability existed.
Q. So they told you that the capability existed?
A. Yes.
Q. But didn't explain it?
A. I didn't ask them to, and they did not It's not rocket science.
Q. Okay. How does key word filtering work, then?
A. You pass a query through this list of words that you didn't want to pass on; and if you hit one of those strings, you do not pass it on.
Q. Okay. And this list is maintained somewhere in the client application?

A. As I understand it.
Q. Do you know what this list -- or what key words are included on this list right now?
A. I'm not sure if it comes with a preset list. I think it's quite an empty list. I believe it comes down as an empty list or essentially empty, and the user fills in the majority of the key words for which he's trying to filter.
Q. So if user doesn't like Constitution, he could put "Constitution" in his key word list?

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A. He can put any string he likes.
Q. Or no string at all?
A. Or no string at all.
Q. Are you aware of any other types of filtering that exist in Morpheus 2.0?
A. Again, I'm not sure if it's in Morpheus 2.0 per se. I'm aware that there are filters which look for viruses or things that can be viruses to prevent them from coming through.
There are bogus file -- attempts to identify bogus files and not pass them through.
Again, I forget which particular implementations have which of those features, but I've seen that appear in some of these systems.
Q. When you say "some of these systems," you mean Morpheus 2.0, Morpheus 1.9, Kazaa, and Grokster?
A. Yes.
Q. And KazaaLite?
A. Yes.
Q. But you weren't sure which the virus and bogus file filtering appears in which of those?
A. I believe I recorded that in my declaration,

and I didn't commit it to memory.
Q. Can you explain to me how the virus filtering works?

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A. As I understand it, there are certain types of file extensions that are suspect, often associated with the viruses, and those can be enabled not to come in.
Q. How does that work?
A. Again, you look at the incoming file, see if the extension matches one of the offending ones. And you do not put it on the client's. You don't allow it to be loaded on the client.
Q. What is one of the extending -- offending file extensions?
A. .exe is sometimes included, not always.
There's a "vb" -- I forget the last letter -- "f," I think, extension with the viruses. I don't remember the list, but some well-known ones often associated with viruses.
Q. But there are also files with those file extensions that are not viruses, correct?
A. You can do anything you like. You could create such a file if you wanted to perhaps be suspect as a virus. I don't know why you would do that, but --
Q. Someone could write an exe file that was a virus; someone could write an exe file that was not a virus?
A. That's correct. Also, I don't know if I included bogus files.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed Oct. 21, 2002]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

DECLARATION OF STEVEN D. GRIBBLE, PH.D., IN SUPPORT OF DEFENDANT MUSICCITY.COM, INC.'S (NOW KNOWN AS STREAMCAST NETWORKS, INC.) AND MUSICCITY NETWORKS, INC.'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

* * * *

Downloading Files over GnutellaNet.

32. Each QueryHit message that flows back to a Morpheus peer contains the file name(s) of the candidate matching file(s), as well as the IP Address of the hosting peer. If Morpheus initiates a download of a candidate matching file, Morpheus uses the IP Address to create a temporary Internet connection directly between the Morpheus peer and one or more hosting peers (i.e., the peer or peers hosting the file to be downloaded). Morpheus uses this temporary Internet connection to transfer the file from the hosting peer to the Morpheus peer. *See* Exh. 20. This transfer is accomplished using "HTTP", the standard World-Wide Web file transfer protocols. Morpheus 2.0 also includes an additional facility for using "PCP" for transferring files. PCP is a transfer protocol that can recruit

other peers to participate in the transfer of the file in order to make transfers more efficient.

33. Based on my examination of the Morpheus source code, and observations of the Morpheus program during execution, information relating to file transfers between voluntarily-participating Gnutella peers does not to flow to any servers operated by StreamCast. File transfers only involve only the peer initiating the download, and the peers from which the file is served. As a consequence, it is my opinion based on the foregoing that StreamCast currently has no ability to directly monitor or control which individual files are downloaded by Gnutella peers – including Morpheus peers.

Overview of Morpheus-Fast Track

34. Two previous version of the Morpheus software (versions 1.2 and 1.3) relied on a different protocol (known as the FastTrack protocol) to implement file-sharing functions. FastTrack is a protocol that differs from the Gnutella protocol, but FastTrack serves many of the same functions: to allow end users to connect to the FastTrack network, and to search for and share digital files.

35. Unlike Gnutella, the FastTrack protocol is proprietary and closed. This protocol was developed by programmers affiliated with defendant Kazaa, and most of the details of how this protocol functions are not publicly known. As a consequence, for Streamcast to make use of FastTrack, they needed to license the use of software that implements the protocol. StreamCast had no power to alter the software which implemented the FastTrack protocol; it is my understanding that Kazaa, B.V., or entities affiliated with Kazaa had such power. As an additional consequence, I have not been able to examine the operation of a FastTrack-based application with the same detail as I can with a Gnutella-based application. Many of my conclusions are therefore

drawn from information contained within the depositions and declarations produced by this litigation, as well some details that have been released to the public.

36. A FastTrack-based network consists of several components that co-operate to form a file-sharing network:

(a) Nodes: a node serves a similar role to a Gnutella peer in the Gnutella network. It is simply a computer connected to the Internet running FastTrack-based client software such as Morpheus 1.2, Morpheus 1.3, or Kazaa. Unlike Gnutella, FastTrack nodes rely exclusively on "Supernodes" to perform searches on their behalf, instead of forming connections directly with other nodes to perform searches. Similar to Gnutella, once a user has found a candidate file from a search and elects to download it, that user's FastTrack node will transfer the file directly from other FastTrack nodes.

(b) Supernodes: Supernodes in the FastTrack network serve three basic functions. First, they collect lists of files being shared by the nodes that choose to connect to them. Second, they process search requests on behalf of nodes, including searching the lists of files they learn from nodes, but also passing search requests on to other Supernodes. Third, they collect and distribute lists of other Supernodes in the network; these lists are presumably distributed to both nodes and Supernodes. At any time, there can be a large number of Supernodes active in a FastTrack-based network. No one Supernode has complete knowledge of all files that have been made available for sharing on the network. Because file transfers occur directly between nodes, it appears as though Supernodes do not have knowledge of individual file transfers, when they occur. All nodes in the

FastTrack network contain enough software to become Supernodes; depending on the connection speed, memory, and processing power of a node, that node may elect to promote itself to become a Supernode. A user is given the ability to prevent a node from becoming a Supernode, although by default, this promotion will happen without the user realizing it has taken place.

(c) Root or "seed" Supernodes: The FastTrack network has the ability to run dedicated "root Supernodes", whose function appears to be to help nodes bootstrap themselves by introducing them to regular Supernodes. If a node cannot contact any Supernodes, it can fall back to a root Supernode to obtain a fresh list of Supernodes that may be currently active in the FastTrack network.

(d) Log-in servers: Users of the FastTrack network have the ability to create accounts, in order to maintain a persistent username that is visible to other users of the network, and which can be used to find and "chat" with other users of the network. When a user first launches her FastTrack client software, the software attempts to "log in" to a log-in server, to verify this persistent username.

37. Similar to Morpheus-Gnutella, the Morpheus-FastTrack software consists of several components. The Morpheus "Media Desktop" component (a custom-branded version of Kazaa's Media Desktop software) is the main interface visible to a user of the software; through the Media Desktop, the user could access other components of Morpheus-FastTrack. Morpheus-FastTrack also includes a "mini-browser" for displaying advertisements, a broader facility for web-browsing that could display a "start page" served from a StreamCast web server, a facility for launching

a "media player" for playing audio or video files, an interface to the file-searching and transfer FastTrack functions, a "chat" component, and an interface for managing files shared through Morpheus.

Network Operation

38. When Morpheus-FastTrack is first launched, it attempts to find a Supernode and forge a connection to it; this is a similar process to "bootstrapping" in the Gnutella network. I am informed that Morpheus 1.2 would first contact a root Supernode run by Kazaa or StreamCast to obtain a list of Supernodes which had contacted that root supernode recently, whereas with Morpheus 1.3, Kazaa embedded a list of active Supernodes into the Morpheus software. This means that, assuming that at least one of the Supernodes in its list is active and accepting connections, Morpheus 1.3 could bootstrap itself without relying on a root Supernode. Once connected to a Supernode, a Morpheus-FastTrack node would send a list of its shared files to the Supernode.

39. To search for a file, a user would type in search criteria into the Morpheus-FastTrack user interface. Morpheus-FastTrack would relay the search criteria to its Supernode, which would process the search. To process the search, the Supernode would consult the lists of files sent to it by its nodes; if enough matches were found, the Supernode would send the matches back to the user. If not enough matches were found, the Supernode would relay the search criteria to other Supernodes in the FastTrack network in an attempt to find additional matches.

40. Files that match the search criteria are displayed to the user in the Morpheus-FastTrack user interface; a user could then elect to initiate a transfer of one of the matching files. I am informed that file transfers proceed directly between nodes in the network, and that Supernodes, root

Supernodes, and log-in servers do not interact with nodes during file transfers.

INTERACTION BETWEEN STREAMCAST SERVERS AND MORPHEUS-FASTTRACK

41. The file-sharing functions of Morpheus-FastTrack interact with Streamcast operated servers in several ways. Because of the proprietary nature of the FastTrack protocol and software components, the full details of these interactions are unavailable to me. Similarly, I am informed that StreamCast itself has only limited knowledge of what interactions are possible between the Morpheus-FastTrack client software and StreamCast servers. I believe it is important to make a distinction between what is technically possible in the FastTrack architecture, and what knowledge StreamCast has (and had) about these technical possibilities. The full extent of what is possible is only known by the designers of the proprietary FastTrack protocol and the authors of the FastTrack software components. However, based on the interactions between StreamCast servers and these versions of Morpheus which I have examined or about which I have information, none of the interactions of which I am aware give StreamCast the ability to control the user's ability to share or download specific files.

42. I am aware that at least the following kinds of interactions with StreamCast servers can take place:

(a) Installation and account creation: the first time that a user launched Morpheus-FastTrack, the user would be prompted to provide various pieces of demographic information, including an account name, a password, and email address, and the choice of whether to receive a newsletter. These four pieces of information would be sent to the log-in server, and assuming the account name had not already been taken, the information would be stored to create a

new account in a database managed by the log-in server.

(b) Log-in and authentication: when Morpheus-FastTrack is first launched, it attempted to log in to a "log-in server" operated by StreamCast. Logging in means validating that a user's account name and password match an account in the log-in server database. I am informed that if the log-in server is unavailable, the log-in process would succeed although the user would be "anonymous" (wouldn't have a persistent username associate with her). If the account name and password do not match what is in the database, I am informed that the user would not be able to connect to or interact with the FastTrack network. The log-in server also appears to be able to make use of a list of "banned" IP addresses; presumably, if the IP address of a node attempting to log-in matches an IP address in the banned list, the log-in would fail and the user would not be able to join the FastTrack network. I am informed that StreamCast did not attempt to make use of this functionality.[12]

(c) Updating and other modifications: As part of the log-in process, it appears as though the log-in server would transmit information to the Morpheus-FastTrack node that is logging in. This information appears to include announcements of new versions of the Morpheus-FastTrack software that are available for download; if a new version is available, I am informed that the user is given the choice to download

[12] Banning an IP address is not an effective method of preventing a user from logging into the network since many users use dynamic IP addresses. As such, banning an IP address will not prevent such users from logging-in in the future as their IP address will have changed.

and install it. The information also appears to include certain parameters that would affect the behavior of the Morpheus-FastTrack node, such as details of what other "brands" of FastTrack software Morpheus-FastTrack should interact with. The ability to select a "brand" of Morpheus to connect to does not appear to give StreamCast the ability to control the user's ability to download or make available specific files. Because of the proprietary nature of the protocol and software involved, I am unaware of what (if any) additional information that is exchanged between a log-in server and a Morpheus-FastTrack node.

(d) Bootstrapping: for some period of time, StreamCast operated a root Supernode. Versions of the Morpheus-FastTrack software that did not include a list of Supernodes would need to contact a root Supernode to bootstrap themselves; I am informed that other parties (including Kazaa) operated root Supernodes that Morpheus-FastTrack components would be able to contact. Versions of the Morpheus-FastTrack software that did include a list of Supernodes would only need to contact a root Supernode if none of the hosts in its list of Supernodes were active or accepting new connections.

(e) Supernode communications: for the period of time that StreamCast operated a root Supernode, that root Supernode presumably engaged in communications with other Supernodes in the FastTrack network. The details of what communications occurred and what information was exchanged are not available to me, given the proprietary nature of the protocol and software involved. I am informed that this communication

included other Supernodes relaying lists of known Supernodes to StreamCast' s root Supernode.

(f) Non-file-sharing interactions: other components of the Morpheus-FastTrack software would interact with StreamCast servers, including the ad-serving component, the "chat" component, and the web-browsing components.

INTERACTION BETWEEN STREAMCAST SERVERS AND MORPHEUS-GNUTELLA

43. Based on my review of the Morpheus source code, and my observations of Morpheus while executing, it is my opinion that no interaction with the StreamCast servers is required in order for a user of Morpheus to carry out the file sharing

* * * *

FILTERING TECHNOLOGIES

59. I am aware that the Plaintiffs in this litigation have proposed that it would be possible to incorporate various "filtering" technologies into the Morpheus software: For completeness, I think it is important to express various technological challenges that such filtering technologies would face during deployment.

60. *Trust:* Certain of the technologies suggested by Plaintiffs would require that a user accept a certain amount of control from one or more third party "filterers." Introducing this control will introduces trust concerns, because these third parties are entrusted to "filter in" or "filter out" files from the network. If a "filterer" is subverted by hackers or others of ill will, the element of control given to these filterers could subject to abuse, making the peer-to-peer network vulnerable to manipulation that is currently not possible.

61. *Privacy:* Certain of the technologies suggested by Plaintiffs would require a user to send data on all files he or she wishes to make available to one or more third parties, which presumably would review the content of the files to "authorize" the sharing of the files. Because this third party would therefore have the means to identify the content shared with the owner of the shared content, such a system raises the potential for a compromise or abuse of the privacy of individual users by these third parties.

62. *Performance:* Certain of the technologies suggested by Plaintiffs would require Morpheus peers to scan and upload "fingerprint" data concerning files on a user's computer. The scanning of the files on the computer has the potential of degrading the performance of the file-sharing functions as perceived by the user. Similarly, the uploading of the fingerprint data has the potential of degrading the network performance perceived by the user, especially if the volume of fingerprint data is large, and the user is connected to the Internet via a low-bandwidth network (such as over a telephone modem).

63. *Scalability and availability:* Certain of the technologies suggested by Plaintiffs would require that a database of file fingerprints be assembled. When a file is offered for sharing on the network, a fingerprint of that file is presumably compared against the database of fingerprints to see if the file should be allowed to be shared. If this database is maintained centrally, then this comparison must be done over the network; the database will therefore become a centralized component on which the correct functioning of the network depends. Centralized components are known to have scalability and availability issues, as previously discussed. If the database is not maintained centrally, some sort of distributed system would need to be designed; the

design of a distributed fingerprinting/filtering system would not be straightforward, in my opinion.

64. The proposals for a filtering mechanism discussed by Plaintiffs' witnesses do not account for a number of difficult technical challenges to the implementation of filtering technologies in a distributed peer-to-peer network which must be addressed prior to a successful deployment of such a mechanism. Plaintiffs' experts do not adequately address a number of these challenges. Even if Plaintiffs' experts were able to adequately resolve the technical challenges which filtering mechanisms face, such mechanisms would require alterations to the Morpheus software and would also significantly impact the architecture and operation of a peer-to-peer network.

65. Attached hereto as Exhibit 1 is a true and correct copy of my curriculum vitae.

66. Attached hereto as Exhibit 2 is a true and correct copy of a glossary of the technical terms used in this declaration and in other related papers filed by Defendants.

67. Attached hereto as Exhibit 3 is a true and correct pictorial representation of a centralized network structure.

68. Attached hereto as Exhibit 4 is a true and correct pictorial representation of a decentralized network structure.

69. Attached hereto as Exhibit 5 is a true and correct copy of a screen shot of the share configuration page used in Morpheus 2.0 to designate certain user files for sharing over the Gnutella Network.

70. Attached hereto as Exhibit 6 is a true and correct pictorial

* * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Appellants, v. GROKSTER, LTD., et al., Appellees.	No. 03-55894
[Filed May 30, 2003]	

DECLARATION OF KEN JACOBSEN

I, KEN JACOBSEN, the undersigned, declare:

1. I am the Senior Vice President and Director, Worldwide Anti-Piracy, at the Motion Picture Association of America ("MPAA"). I submit this declaration in support of plaintiffs' motion to expedite the appeal in this matter. I have personal, first-hand knowledge of the facts set forth in this declaration, except for facts that are stated on information and belief.

2. United States films are shown in more than 150 countries worldwide and American television programs are broadcast in over 125 international markets. The United States film industry provides the majority of prerecorded cassettes seen in millions of homes throughout the world. This complex audiovisual industry has been represented globally by the Motion Picture Association ("MPA") since 1945. Its sister organization, the MPAA, was founded in 1922 and is the trade association of the American motion picture industry.

3. MPAA members and their affiliates own or control the rights to a substantial portion of the major motion

pictures produced or distributed in the United States. In my role as Senior Vice President and Director, Worldwide Anti-Piracy, I am responsible for overseeing and directing worldwide copyright enforcement activities on behalf of the MPAA's member companies. My responsibilities include, among other things, the design, implementation, and execution of strategies to protect MPAA member companies' audiovisual products from copyright infringement in over 60 countries worldwide. This includes supervising and reviewing the work of detecting and monitoring copyright infringement committed by users of such "peer-to-peer" file copying and distribution systems as those provided by defendants/appellees StreamCast Networks, Inc. ("StreamCast") and Grokster, Ltd. ("Grokster").

4. I am generally familiar with peer-to-peer file copying and distribution systems, and in particular those provided by StreamCast and Grokster. On October 2, 2001, eight member companies of the MPAA ("the Studio Plaintiffs"), along with a number of recording companies, filed a complaint against Grokster, StreamCast, and co-defendant Kazaa BV in this action. Since then, the use of the defendants' systems for infringement has significantly increased. According to StreamCast, its "Morpheus" software has been downloaded more than 110 million times, and its file copying and distribution system currently has one million simultaneous users. Grokster's self-named "Grokster" software has been downloaded more than 8 million times and connects to a proprietary file copying and distribution system that reportedly has more than 4 million simultaneous users.

5. On information and belief, the overwhelming use of StreamCast and Grokster's systems is for infringement – primarily the downloading (copying) and distribution of

sound recordings and audiovisual works without the authorization of the copyright owners.

6. At my direction and under my supervision, the MPAA commissioned monitoring of the defendants' systems for the purpose of giving notice of some of these infringements. Even a limited amount of monitoring of small portions of the defendants' systems over short periods of time uncovered tens of thousands of instances of infringements of hundreds of the Studio Plaintiffs' motion pictures and television programming. This has included the infringement of dozens motion pictures that, at the time, were in first-run theatrical release and lawfully available only in theaters.

7. StreamCast's and Grokster's conduct is causing grave and irreparable harm to appellants. The StreamCast and Grokster systems permit the unauthorized downloading and distribution of untold numbers of copies of the Studio Plaintiffs' motion pictures and television programming. Because of the enormous number of infringements, it is not possible to seek and obtain recovery from all of the individual infringers. Thus, as a practical matter, the Studio Plaintiffs will be left without any possibility of monetary compensation or other relief for the infringements that have taken place via the defendants' systems and that will continue to take place via the defendants' systems during the pendency of the appeal.

8. Each of the Studio Plaintiffs is involved in its own planning, implementation, and participation in services to provide motion pictures and other audiovisual works to online customers. Such efforts are irreparably injured when defendants Grokster and StreamCast facilitate the large-scale and unauthorized distribution of plaintiffs' works to potential customers for free, with no compensation to plaintiffs.

9. StreamCast's and Grokster's conduct also fosters the widespread perception among their users that the Studio Plaintiffs' audiovisual works – in which significant talent, effort, and money have been invested – are and should be available for free, without compensation to the creators and owners of these works.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on May 30, 2003, at Los Angeles, California.

/s/
Ken Jacobson

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Appellants, v. GROKSTER, LTD., et al., Appellees.	No. 03-55894
[Filed June 3, 2003]	

DECLARATION OF CHARLES J. SANDERS

I, Charles J. Sanders, declare as follows:

1. I am Senior Vice President of Legal Affairs of the National Music Publishers' Association, Inc. ("NMPA"). I submit this declaration in support of plaintiffs' Motion to Expedite Appeal; Modify Briefing Schedule, or, Alternatively, Expedite Oral Argument.

2. NMPA is the principal trade association of music publishers in the United States. Music publishers are deeply involved in the creative process, from discovering and fostering new songwriters, to promoting the use of songwriters' music. The over 700 music publisher members of NMPA, and their subsidiaries and affiliates, represent the interests of songwriters, and own or control the overwhelming majority of musical compositions available for licensing in the United States. Since it was founded in 1917, NMPA has been involved in legislative, legal, and educational initiatives relating to copyrights on behalf of the common legal interests of music publishers and their songwriters.

3. NMPA's licensing affiliate, The Harry Fox Agency, Inc. ("HFA"), is an industry service organization that represents over 27,000 publisher-principals, who in turn represent the interests of more than 160,000 songwriters. These publisher-principals own more than 2.5 million copyrighted musical compositions, all of which can be licensed by HFA on their behalf for the manufacture and distribution of CDs, cassette tapes, phonograph records, and digital phonorecord deliveries ("DPDs") – collectively, "phonorecords" within the parlance of the Copyright Act. HFA also collects and distributes royalties derived from these licensed uses of copyrighted music and audits licensees on behalf of its publisher-principals.

4. Songwriters' exclusive "mechanical" rights to make and distribute phonorecords containing sound recordings of their musical works are subject to a statutory compulsory license. *See* 17 U.S.C. § 115(a). After the copyright owner has licensed the copyrighted musical composition for mechanical reproduction in the United States at least once, anyone else has the right to make and distribute phonorecords of that song by taking a license and paying the copyright owner a statutory royalty rate, which is currently 8 cents.

5. In 1995, Congress confirmed that this compulsory license extends to the distribution of sound recordings of copyrighted musical compositions digitally over the Internet – DPDs – in the same manner as physical media (CDs, cassette tapes, and phonograph records). *See id.* § 115(c)(3)(A). The statute also affirms that the unauthorized making of a DPD of a sounding recording containing a copyrighted musical work is an act of infringement under Section 501 of the Copyright Act. *See* 17 U.S.C. § 115(c)(3)(H)(i).

6. In recent years, HFA has licensed – as agent for its publisher-principals – mechanical rights in musical compositions for reproduction and distribution over the Internet. HFA has negotiated and granted, on behalf of its members, license agreements with several Internet entities, including Streamwaves, Listen.com (Rhapsody), FullAudio, and MP3.com. It has also consummated a general agreement with the Recording Industry Association of America to provide licenses for the use of copyrighted musical works on Internet music subscription services.

7. I have discussed with many of our members the unlicensed, peer-to-peer Internet "file-sharing" services of Defendants StreamCast Networks, Inc., MusicCity Networks, Inc., and Grokster, Ltd. However, I am unaware of any music publisher represented by HFA that has granted Defendants or their users a license to make DPDs of their copyrighted musical works. Defendants simply allow their users to upload and download for free virtually any copyrighted musical work they want. Indeed, I am informed and believe that Defendants' services are nothing more than upgraded "Napsters" – the unlicensed, peer-to-peer Internet "file-sharing" service that was the subject of a preliminary injunction for promoting copyright infringement on an unprecedented scale. *See A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001).

8. I am informed that the plaintiffs in the *Leiber* and *MGM* actions have sent Defendants notices identifying millions of specific files containing copyrighted music and motion pictures that are being unlawfully distributed on their services. The Defendants have taken no action in response to these notices to stop the rampant infringements taking place daily on their services.

9. Thus, I believe that songwriters and music publishers will be irreparably harmed if this Court does not expedite the appellate process in this case. First, the wholesale infringements of their works occurring on Defendants' services is resulting in untold *millions* (perhaps even billions) of dollars in monetary damages. While this appeal is pending, the massive copyright infringement that Defendants are encouraging and benefiting from will continue unabated. And in the interim, it would be impractical, if not impossible, for songwriters and music publishers to pursue the *millions* of individual users who upload or download copyrighted material. Thus, songwriters and music publishers have no reasonable expectation of ever being compensated for these infringements. Second, the value of and perceived need for licenses from songwriters will continue to be seriously diminished. Songwriters are heavily dependent on the existence of a legitimate market for sound recordings of their copyrighted musical works. Defendants' services are diverting – and will continue to divert – an ever increasing number of users from the music publishers' legitimate licensees, depriving songwriters of their primary source of livelihood.

10. Songwriters and music publishers invest substantial time, money, and resources to write and publish popular musical compositions. Songwriters make their living, in significant part, by licensing their mechanical rights in those compositions. Indeed, many of the music publishers represented by NMPA and its affiliates are wholly owned by individual songwriters who rely for their livelihoods exclusively or primarily on their royalty income from licensing their original musical works. Songwriters do not produce or distribute physical products; they have no control over the commercial distribution of phonorecords containing their copyrighted musical works. As a result, songwriters

rely on copyright users to comply with the law by obtaining a license and paying the royalties prescribed.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 5th day of June, 2003 at New York, New York.

/s/

Charles J. Sanders

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Appellants, v. GROKSTER, LTD., et al., Appellees.	No. 03-55894
[Filed June 5, 2003]	

DECLARATION OF HILARY B. ROSEN

I, HILARY B. ROSEN, the undersigned, declare:

1. I am Chairman and Chief Executive Officer of the Recording Industry Association of America, Inc. ("RIAA"), where I have been a senior executive for 16 years. I make this declaration in support of appellants' Motion to Expedite Appeal in this action. I know all of the following facts of my own personal knowledge and could, if called and sworn as a witness, competently testify thereto.

2. The RIAA is a not-for-profit trade association, of which the record company appellants in this action, among others, are members. The RIAA represents record companies that collectively create, manufacture, and distribute over 90 percent of all legitimate sound recordings sold commercially in the United States.

3. I ultimately oversee all aspects of the RIAA's operations, including relations with RIAA member companies, developments in the record industry, and anti-piracy efforts. I am generally familiar with "peer-to-peer" file copying and distribution services, and in particular Defendants StreamCast (formerly known as MusicCity) and Grokster. Since this action was filed in October 2001, the

use of those systems for infringement has skyrocketed, and the systems continue to grow rapidly. StreamCast claims that its "Morpheus" user software, used to access the Morpheus system, has been downloaded over 110 million times, and it boasts over 1 million simultaneous users. Grokster claims over 8 million downloads of its user software. The explosive growth of these systems has been accurately termed as "viral" – that is, the growth occurs exponentially. The vast majority of these users is infringing the sound recordings owned or controlled by the appellants.

4. Moreover, the overwhelming use of the StreamCast and Grokster systems is for infringement – primarily the downloading (copying) and distribution of sound recordings without the authorization of the copyright owners, the bulk of whom are the appellants here. The StreamCast and Grokster systems are largely used to infringe the most popular and valuable sound recordings owned by appellants. Users of these systems routinely copy and distribute without authorization or payment to the copyright owners sound recordings that are currently on the Billboard 100 albums, Billboard Hot 100 singles, and numerous other "hit" charts. In addition, the StreamCast and Grokster systems give users ready access to sound recordings that have not yet been released to the public for sale before those recordings are officially released by the record companies to the public.

5. Although they are capable of it, StreamCast and Grokster do not make any effort whatsoever to filter or block infringing recordings from their systems. They do, however, block, or give their users the tools to block, other types of digital files, such as pornography and files containing viruses. This deliberate indifference to copyrights has enabled the StreamCast and Grokster systems to flourish, and creates substantial revenue for StreamCast and Grokster at the expense of copyright holders, including appellants.

6. StreamCast's and Grokster's conduct is causing grave and irreparable harm to appellants. Not only do the StreamCast and Grokster systems permit downloading of millions of copies of sound recordings of record company artists every week for free and in unsecured format, they also foster the widespread perception among their users that the record companies' music should be distributed and made available for free over the Internet – free of any revenue participation by or licensing fees paid to copyright owners and artists. The perceived value of music is irreparably harmed by the notion that it is free. So too is the value of appellants' digital distribution businesses, described in more detail below, founded on the notion of compensation to copyright holders. The irreparable harm associated with StreamCast's and Grokster's infringing activities is manifest and is occurring at the very time record companies are attempting to succeed in a commercial market for the same recordings that StreamCast and Grokster enable users to copy for free.

7. In addition, over the last several years, record industry sales of compact discs and cassettes have substantially declined. In 2002, record sales I dropped approximately 11% from the previous year; in 2001 they fell 10% from the year before; and in 2000 they were 7% lower than in 1999. There can be little doubt that the StreamCast and Grokster systems, and other systems like them, are largely responsible for this accelerating decline in sales. Without expedited action by this Court on this appeal, the record industry will be dealt a blow from which it may never recover.

8. Understanding the irreparable harm that StreamCast and Grokster are causing to the appellants is best understood by comparing the tremendous investment of resources that record companies expend to create, manufacture, release, and promote sound recordings to the

trivial investment of resources by StreamCast and Grokster to facilitate and enable the infringement of those sound recordings. StreamCast and Grokster ride on the backs of, and directly profit from, the work record companies have done to release their sound recordings, all the while diverting sales from the record companies who are responsible for creating those sound recordings.

9. In connection with their businesses, record companies generally enter into contracts with musical performers whereby, in exchange for significant consideration, they become owners of copyrights in sound recordings created by those performers during the term of the agreements. Among other things, those copyrights, as well as the underlying agreements, give the record companies the exclusive right to reproduce, manufacture, and distribute such recordings. Record companies typically also acquire the rights to catalogs of sound recordings. Pursuant to licenses or recording agreements, record companies typically also own the exclusive rights to many recordings that were recorded prior to February 15, 1972, when Congress enacted copyright protection for sound recordings.

10. To my knowledge, no major record company, and no appellant, has licensed StreamCast or Grokster the right to distribute or download (copy), or authorize others to distribute or download, any of their sound recordings. Nevertheless, millions of copies of appellants' sound recordings are unlawfully copied and distributed on StreamCast's and Grokster's systems every week.

11. The recordings that are owned by record companies reflect the investment of substantial time, money, and the creativity of many people. That investment includes, among other things, recording and manufacturing costs, advertising, promotional, and marketing costs, and payments to recording artists, music publishers, musicians and back up

singers. Record companies also make substantial payments to unions such as the American Federation of Musicians and the American Federation of Television and Radio Artists, which are used to fund pension and health funds for musicians and performers. Record companies are able to make such payments from the revenues they derive from sales of the copyrighted sound recordings that they own.

12. In order to maximize sales, record companies typically develop a release schedule and marketing plan for their major releases many months in advance. They carefully consider the timing of their releases in the marketplace, as well as numerous other issues, including those involving the type of advertising and any special promotional or merchandising aspects of the release. Typically, record companies first release sound recordings on compact discs and cassette tapes, and only later offer certain of those recordings for download over the Internet. Many sound recordings are available for unauthorized copying and distribution on the StreamCast and Grokster systems even before the record companies officially release these recordings to the public on compact discs and cassettes, let alone for authorized distribution over the Internet.

13. The nature of the record industry is such that a relatively small percentage of recordings made and/or released by a record company achieve significant commercial success, recognition, and public acceptance. The others are not commercial successes and result in a loss of the record companies' significant investment. It is commonly understood and reported in the record industry that up to 85 or 90 percent of albums released do not recoup their costs and earn a profit. Therefore, a record company's business, and its ability to sign new artists and release new recordings, is largely dependent on its successful or hit records.

14. The major record companies planned their entrance into the digital distribution market for several years, at great expense. This process was, and remains, very time consuming and complex. It involves, among many other considerations, the ongoing development, analysis, and reassessment of numerous business models to determine which one or ones will prove most successful. This continuing and time and resource-consuming process includes the coordination of the timing of releases of sound recordings in the compact disc and digital formats; the negotiation and procurement from music publishers, artists, and others of rights to sell and distribute music over the Internet; the ongoing development, analysis, and reassessment, either alone or with partners, of efficient and effective systems to sell music to the consumer on-line; and the development, analysis, and continuous reassessment of technology to provide security and rights management systems to protect the record companies' valuable copyrighted works on the Internet. The most difficult challenge, however, is trying to compete with unauthorized and unlawful Internet systems, such as StreamCast and Grokster, which are responsible for facilitating the distribution for free of millions of copies of the very same sound recordings that record companies are attempting to sell to consumers through digital distribution over the Internet, and by compact disc or other physical formats.

15. All of the major record companies, and many independent labels, sell over the Internet their recordings in secure digital format – one that prevents unauthorized copying and distribution of the sound recording. They have all licensed their sound recordings to be sold through legitimate, authorized Internet digital distribution services such as pressplay, MusicNet, Rhapsody, and others. By these services, the record companies offer the digital download of their sound recordings through, for example,

Microsoft Corp.'s MSN Music, Roxio, Yahoo!, aol.com, and real.com, and a variety of other online outlets, including Lycos and traditional retailers. Additionally, very recently, the five major record companies have begun offering hundreds of thousands of their recordings for digital distribution over the Internet in connection with Apple Computer, through a service known as iTunes. The digital distribution of music is a major component of the record companies' businesses, which are being built around such distribution, as well as the businesses of the record companies' partners.

16. Because many, if not all, of these recordings are available on the StreamCast and Grokster systems for free and without any security or restrictions on copying whatsoever, the record companies are in the untenable position of trying to sell the same recordings that StreamCast and Grokster provide for free to the same consumers. StreamCast and Grokster's infringing activities – making available the record companies' important and valuable recordings for unauthorized distribution and copying over the Internet – already have had, and necessarily will have in the future, a substantial impact on the record companies' success in the digital distribution market, and will continue to harm appellants sales of compact discs and other physical formats. If the District Court's opinion is not reviewed and reversed on an accelerated basis, it is no exaggeration for me to say that I fear for the future viability of the record industry.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on June 5, 2003, at Washington, DC.

/s/
Hilary B. Rosen